166-722

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 764.

THE ANGLO-CALIFORNIAN BANK, LIMITED,
PETITIONER,

vs.

THE SECRETARY OF THE TREASURY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FILED MARCH 29, 1897.

(16,543.)

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a In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
vs.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

In the matter of the petition of the Secretary of the Treasury for review of a decision of the board of United States general appraisers relative to certain twenty steel rails.

Transcript on Appeal.

From the circuit court of the United States for the northern district of California.

1 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Circuit in and for the Northern District of California.

Petition.

The petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York, State of New York, in the matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of said San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited, at the same place.

To the honorable the circuit court of the United States, ninth circuit in and for the northern district of California:

The petition and application of the Secretary of the Treasury respectfully shows—

That your petitioner is and at the several times hereinafter mentioned was the Secretary of the Treasury of the United States.

That the Bank of California and the Anglo-Californian Bank, Limited, hereinafter mentioned, at the several times hereinafter referred to, were and are corporations duly organized and ex-

2 isting, the former under and by virtue of the laws of said State of California, the latter under and by virtue of the laws of the Kingdom of Great Britain and Ireland, both engaged in the business of banking, in the city and county of San Francisco in said State, and elsewhere, which included, among other things, the importation of foreign merchandise heretofore and hereinafter mentioned into said port.

That on or about the second day of March, 1887, the said Bank of California imported into the United States, to wit, at the said port of San Francisco, California, from a foreign port or place, to wit, from Barrow, in the Kingdom of Great Britain and Ireland, certain merchandise invoiced as flange (T) steel rails, by the steamship or vessel known as the "Troop," which said merchandise purports to be more fully described in and by the warehouse entry thereafter made thereof at the custom-house at the said port of San Francisco, California, and numbered 1031 (the said merchandise being more fully described as the merchandise subject to entry number 1031 and protest number 3876 of the official serial numbers of said custom house, and subject to decision number — of the official serial numbers of the board of United States general appraisers on duty at New York, State of New York, and being further described and identified as flange steel rails, upon the custom-house record invoice number 2733, series of 1888, relating to said merchandise), and which said merchandise included the said rails heretofore described, and the subject of the protest heretofore and hereinafter mentioned; and such merchandise remained in general order un-

3 claimed until the 27th day of February, 1888, when warehouse entry thereof was made and bond given by the said Bank of California as such importer and consignee; and thereupon such proceedings were had that said warehouse entry was duly liquidated March 30, 1888, by the collector of said port, under the act of March 3rd, 1883, in full force and effect at said time at $17.00 per ton, and said merchandise placed in bonded warehouse; and at the expiration of one year from the date of said original importation, the said merchandise not having been removed from said warehouse, the additional duty of 10 per cent. prescribed by section 2970, U. S. R. S., also in full force and effect at said time, was charged upon the bond against said merchandise.

That thereafter and at the expiration of three years of said bonded period, said merchandise not having been removed from said warehouse, your petitioner, upon application of the Oregon Pacific Railroad Company, a corporation, for whose account said merchandise was imported, authorized a postponement of the sale of said merchandise abandoned to the United States under the provisions of section 2971, U. S. R. S., for three months, and further and similar postponements were thereafter authorized by your petitioner, the Bank of California uniting in the application of said Oregon Pacific Railroad Company therefor.

That thereafter, and during the time embraced in such postponements of sale, and on the 15th day of March, 1895, withdrawal entry for consumption of said twenty steel rails, which are part of the merchandise hereinbefore mentioned, and are the subject

4 of said protest, weighing about five tons, was made by said Anglo-Californian Bank, Limited, upon the authority of the said Bank of California, importer and consignee as aforesaid, and duty thereon was liquidated and assessed by the said collector of the said port of San Francisco, at the said sum of $17.00 per ton, and 10 per cent. additional under the said act of March 3rd, 1883,

and said section 2970, U. S. R. S., which said sum amounting to the sum of $92.20 was liquidated, ascertained, levied and collected by said collector, and the full amount thereof, together with all charges ascertained to be due upon said merchandise, was paid by said Anglo-Californian Bank, Limited, to said collector on said 15th day of March, 1895.

That within ten days after such liquidation, ascertainment, assessment and payment of said duties, to wit: on the 18th day of March, 1895, the said Anglo-Californian Bank, Limited, being dissatisfied with said exaction, ascertainment and liquidation, and the decision of your petitioner and the said collector in the premises, gave notice to the said collector in writing of such dissatisfaction, which written notice distinctly and specifically set forth the reasons for the objections of said Anglo-Californian Bank, Limited, thereto, as follows:

That the said twenty steel rails having been continued in bonded warehouse, under terms of original warehouse bond with the sanction of the petitioner, all charges, including storage, having been paid thereon, no legal abandonment to the United States has occurred; that they are consequently entitled to be withdrawn
5 from consumption, subject only to the duty prescribed in Schedule C, paragraph 117, act of August 28, 1894, *i. e.*, seven-twentieths of one cent per pound. That section 50, of act of October 1, 1890, was applicable to said rails and made inoperative thereon, paragraph 147 of said act of March 3, 1883, and subjected said rails, if withdrawn after October 6, 1890, and before August 28, 1894, to rate in duty named in paragraph 141 of said act of October 1, 1890, and that the enacting clause of said act of August 28, 1894, was intended as a substitute for section 50 of the said act of October 1, 1890; and further that section 29 of the act of June 10, 1890, and section 50 of the said act of October 1, 1890, repealed section 2970 U. S., R. S., and that the duties on said twenty steel rails shall be assessed at the rate of seven-twentieths of a cent per pound, under said paragraph 117, Schedule C, act of August 28, 1894.

That thereafter and in due and proper time, said collector transmitted all the papers and exhibits on which said entry was made, or connected therewith to the board of the United States general appraisers, then on duty at the said port of New York; and thereafter and on the 19th day of April, 1895, said board, to wit: Wilber F. Lunt, J. B. Wilkinson Jr. and Thad. S. Sharretts, made and rendered their decision in said matter in favor of and sustaining said protest and against the said liquidation, ascertainment and decision made and rendered and duty levied and exacted as aforesaid by said collector.

And your petitioner avers that, as Secretary of the Treasury as aforesaid, he is dissatisfied with the decision of said board of
6 general appraisers as to the construction of the law respecting the act of Congress under which, and the amount of duties to which said steel rails are subject upon their withdrawal entry as aforesaid.

Wherefore, your petitioner as such Secretary of the Treasury, now

applies to this honorable court for a review of the questions of law and fact involved in said decision of said board of general appraisers.

And in respect to said withdrawal entry and payment, your petitioner specifies as the reasons for his objections thereto, that the said board of general appraisers erred in finding as a conclusion of law, holding and deciding that the said rails were not dutiable, upon their withdrawal from bond at the time aforesaid, under the said act of March 3, 1883, and said section 2970, U. S. R. S., but in finding as a conclusion of law, holding and deciding that the said rails were so dutiable under the said act of August 1, 1894, and in finding, holding and deciding that the amount of such duties was properly seven-twentieths of a cent per pound of such rails, and in not finding, holding and deciding that said rails upon their withdrawal were subject to a duty of $17.00 per ton, amounting, with the ten per cent. hereinbefore referred to, to the sum of $92.20.

And your petitioner further prays this honorable court for an order that the said board of general appraisers *to* return to this court the record and evidence taken by them, together with a certified statement of the facts involved in said case, and their decision thereon; and that upon said record and evidence, and such
7 further evidence, if any, as may be taken herein, the court proceed to hear and determine the questions of law and of fact involved in said decision, respecting the liquidation and ascertainment of the rate of duty chargeable upon said merchandise upon its withdrawal from bond as aforesaid, and that upon said determination, said decision of said board of general appraisers be reversed and set aside, and that it be adjudged that the duties on said twenty steel rails, upon their withdrawal from bond as aforesaid, were properly liquidated and assessed at the sum of $17.00 per ton, under said act of March 3, 1883, and ten per cent. additional thereof, under said section 2970, U. S. R. S., 17 May, 1895.

THE SECRETARY OF THE TREASURY,
By H. S. FOOTE,
United States Attorney and Attorney for Petitioner.

SAMUEL KNIGHT,
Ass't U. S. Att'y, of Counsel.

(Endorsed:) Filed May 17, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

8 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States in and for the Northern District of California, Ninth Circuit.

In the matter of the petition of the Secretary of the Treasury of the United States for review of decision of U. S. general appraisers relative to certain 20 steel rails, merchandise imported into the port of San Francisco, California, by the Bank of California, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited.

Order of Court for Return of Record, etc.

Whereas, the Secretary of the Treasury of the United States, has applied to this court to review the questions of law and fact involved in the decision of the U. S. general appraisers on duty at the port of New York, State of New York, made and rendered by said U. S. general appraisers, on the 19th day of April A. D. 1895, liquidating and assessing the sum of seven-twentieths of a cent per pound on said merchandise, upon the withdrawal thereof from bond, which said merchandise was imported into the United States at the port of San Francisco, California, and entered at the custom-house at San Francisco, California, (the said merchandise being more fully described as being the merchandise subjected to entry number 1031 and protest number 3876 of the official serial numbers of said custom-house, and also subject to said decision number — of the official serial numbers of the U. S. general appraisers, to which
9 said numbers, reference is here made, and being further identified as flange steel rails, upon the custom-house record invoice relating to said merchandise.)

And, whereas, the said Secretary of the Treasury of the United States, has duly filed his application and petition for a review of said decision, and praying among other things, that the said U. S. general appraisers be ordered to return to this court the records and evidence taken by them in said cases, together with a certified statement of the facts involved in the case, and their decision thereon.

Now, therefore, in consideration of the premises it is hereby ordered, that the three U. S. general appraisers on duty at the port of New York, State of New York, do, with all convenient speed, return to this court the record of said matter and the evidence taken by them therein, together with a certified statement of the facts involved in the case, and their decision thereon.

And it is further ordered that this order be entered upon the minutes of this court and served upon each member of the said board of three general appraisers, by delivering to each of them a certified copy thereof.

JOSEPH McKENNA, *Judge.*

(Endorsed:) Filed and entered May 17, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

Clerk's Certificate.

I, W. J. Costigan, clerk of the circuit court of the United
10 States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing to be a full, true and correct copy of an original order made, filed and entered on the 17th day of May, A. D. 1895, as the same appears of record in said court in the above-entitled matter.

Attest, my hand and the seal of said circuit court, this 24th day of May, A. D. 1895.

[SEAL.] W. J. COSTIGAN, *Clerk.*

Proof of Service on Appraisers.

I do hereby certify, that in obedience to an order of this court, dated the 24th of May, 1895, on the 11th day of June, 1895, at the city of New York, in my district, I personally served the within order upon the within-named board of three general appraisers, by exhibiting to Wilbur F. Lunt, Joseph B. Wilkinson and Thaddeus S. Sharretts, members of said board, the within original, and at the same time delivering to and leaving with each of them a copy thereof.

JOHN H. McCARTY,
U. S. Marshal, S. D. N. Y.

J. G. McC., New York, June 18, 1895.

(Endorsed:) Filed June 24th, 1895. W. J. Costigan, clerk.

11 In the Circuit Court of the United States for the Northern District of California.

A. W. C. J. P. Lake (Seal), chief clerk board U. S. general appraisers.

In the matter of the application of the Anglo-Californian bank for a review of the decision of the board of general appraisers as to the rate, etc., of duty of certain steel rails imported by said bank on the British ship "Troop" March 2, 1887. Suit No. 1285.

Return of the board of United States general appraisers to the order of Hon. Joseph McKenna, circuit judge, dated New York, June 13, 1895.

Return of Board of U. S. General Appraisers.

The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken in the above matter, and of the facts therein, as ascertained by them.

They state that a letter, hereto annexed marked Exhibit "A" was received from the collector of customs at San Francisco, submitting, under the provisions of section 14 of the act of June 10, 1890, the

protest, hereto annexed, marked Exhibit "B," described as follows:

Colls. No.	Board No.	Protestant.	Vessel.	Date of entry.
3876	26439 B.	Anglo-Californian Bank, Ltd.	Troop.	March 2, 1887.

That accompanying said letter was a letter from the naval officer of San Francisco, which is hereto attached marked Exhibit "C."

12 That also accompanying said letter from the collector of customs at San Francisco were two communications from the acting Secretary of the Treasury containing instructions as to the withdrawal of said merchandise from bonded warehouse, which are hereto attached marked Exhibits "D" and "E."

A letter was received by the board from the acting Secretary of the Treasury transmitting an agreed statement of facts relating to the importation in question signed by the parties in interest, and accepted by the board as correct. Said letter and inclosure are hereto annexed marked Exhibits "F" and "G."

Two affidavits by P. W. Bellingall and George H. Probasco were submitted and considered by the board. They are returned herewith as Exhibits "H" and "J."

That on the 19th of April, 1895, the board rendered their decision herein, a copy of which, known as G. A. 3054, is returned herewith marked Exhibit "K."

EXHIBIT "A."

OFFICE OF THE COLLECTOR OF CUSTOMS,
E. J. B. PORT OF SAN FRANCISCO, *March* 19, 1895.

Board of general appraisers, New York city, N. Y.

GENTLEMEN: Referring the board to the enclosed copy of department telegram of March 15th, 1895, I enclose herewith protest of the Anglo-Californian bank, the duly authorized agent of the Bank of California, against the action of this office in exacting duty at

13 the rate of $17.00 per ton under par. 147 act of March, 1883, and the additional duty of 10 per cent. prescribed by section 2970, Revised Statutes, on the withdrawal for consumption of 20 steel rails from warehouse bond No. 1031, imported by the Bank of California per British ship "Troop," March 2nd, 1887.

The action of this office was in accordance with department letter of October 21st, 1890. Copy enclosed.

The board will observe that the contention of the protestors is that the rails are entitled to be withdrawn at the rates prescribed by the act of August 28th, 1894. Section 14, act June 10th, 1894, has been complied with.

Respectfully, JOHN H. WISE, *Collector.*

(Endorsed:) 26439 B. Custom-house collector's office, San Francisco, Cal., Mar. 19, 1895, John H. Wise, collector. Subject: Protest of the Anglo-Cal. bank. Steel rails. Enclosures 3 M. Received by board of U. S. general appraisers. Mar. 25, 1895.

EXHIBIT "B."

Protest of Anglo-Californian Bank, Limited.

SAN FRANCISCO, *March* 16, 1895.

To the collector of customs, district and port of San Francisco.

SIR: We hereby protest against the liquidation of our withdrawal entry and the assessment and payment of duties as exacted by you, at the rate of $17.00 per ton, under par. 147 of the act of Mar. 3, 1883, with 10 per cent. additional duty under section 2970
14 Revised Statutes, on a withdrawal entry for consumption of twenty steel rails from warehouse bond No. 1031.

Said 20 steel rails (which were imported Mar. 2, 1887, by the Bank of California in the Br. Sh. "Troop" from Barrow, and entered for warehouse, and are more fully described in bonded entry No. 1031 (invoice No. 2733) were withdrawn from U. S. bonded warehouse by protestants from bond 1031, on a proper withdrawal entry for consumption at port of original importation, which duly passed through the various departments of the collector's office and the naval office in the regular manner prescribed for withdrawal of all merchandise from warehouse for consumption. Duties on these 20 T ⊂+− ″ steel rails amount to $92.20 (being 4-18-2-13 at $17.00 per ton—$83.82 and 10 per cent. $8.38) were duly paid March 16, 1895. Although the three years expired March 2, 1890, since that time withdrawals against this bond (1031) have been permitted by the Treasury Department, and now show upon the records of the custom-house, duty paid as *bona fide* withdrawals for consumption, as follows: (26439 B)

Oct. 9, 1891	812	steel rails.
Mar. 31, 1892	625	" "
Apr. 14, 1892	1,217	" "
Aug. 6, 1892	122	" "
Sept. 26, 1892	1,623	" "
Mar. 7, 1893	406	" "
Mar. 13, 1894	70	" "
Mar. 24, 1894	1,116	" "

15 Inasmuch as these rails have been continued in warehouse under the terms of the original warehouse bond, with the sanction of the Hon. Secretary of the Treasury, all charges including storage, having been and still being paid by protest, it is claimed that no legal abandonment to the United States has occurred; that they are consequently entitled to be withdrawn for consumption, and are therefore subject to no other rate of duty than is provided for in Schedule C, paragraph 117, act of Aug. 28, 1894, the only existing legislation for the collection of duties on steel rails or railway bars, *i. e.*, seven-twentieths of one cent per pound.

It is claimed that the language of sec. 50, of the act of Oct. 1, 1890, applicable to merchandise in warehouse on Oct. 6, 1890, for which no permit of delivery to the importer or his agent had been issued, made the rate of duty ($17.00 per ton) provided for in par. 147 of act of March 3, 1883, inoperative, and subjected the rails withdrawn after Oct. 6, 1890, and up to Aug. 28, 1894, to the rate of duty in par. 141 of the act of Oct. 1, 1890, and that the enacting clause of the act of Aug. 28, 1894, in which appear the words, "or withdrawn for consumption," was intended as a substitute for section 50 of the act of Oct. 1, 1890.

It is also claimed that section 29, of the act of June 10, 1890, and section 50, of act of Oct., 1890, repealed sec. 2970, Revised Statutes (see S. S. 15517 G. A. 2827, dated Nov. 24, 1894). We therefore claim that duties should be assessed on these steel rails or railway
16 bars at the rate of seven-twentieths of one cent per pound only, under par. 117, Schedule C of the act of Aug. 28, 1894, and we pay the amount exacted solely to obtain possession of the rails, and claim the withdrawal entry should be readjusted, and the amount overcharged refunded to us.

Yours respectfully,

THE ANGLO-CALIFORNIAN BANK, LD.,
By IN. STEINHART, *Its Attorney-in-fact.*

(Endorsed:) 3876. Inv. No. 2733. Bond No. 1031. Protest. San Francisco, M'ch 16, 1895. Anglo-Californian Bank, Ltd., against liquidation of withdrawal entry, assessment and exaction of $17.00 per ton and 10 per cent. additional duty on certain steel rails withdrawn from warehouse and duties paid M'ch 16, 1895. Imported in the Br. Sh. "Troop" from Barrow, arrived M'ch 2, 1887. Received Mar. 18, 1895. Adjuster's office, custom-house, S. F., Cal. W. P. W. Bellingall, custom-house broker; office, 508 Battery street, S. F. 26439 B.

EXHIBIT "C."

Letter of Naval Officer to Collector.

OFFICE OF THE NAVAL OFFICER OF CUSTOMS,
PORT OF SAN FRANCISCO, *March 19th*, 1895.

Hon. John H. Wise, collector of the port.

SIR: The protest of the Anglo-Californian bank, in the case of steel rails covered by dep't letter of Oct. 21st, 1890, and dep't telegram of March 15th, 1895, is overruled. The case should go
17 to the G. A. for ascertainment of facts upon which the dep't may finally decide it.

Respectfully,

JOHN P. IRISH,
Naval Officer.

(Endorsed:) San Francisco, Cal., naval office, March 19, 1895, John P. Irish, naval officer. Subject: Protest of Anglo-Californian bank. Invoice No. 2733. W. H. bond, 1031. Steel rails. No. of inclosures, 3. 26439 B.

EXHIBIT " D."

Letter of Assistant Secretary of Treasury to Collector.

Copy.

TREASURY DEPARTMENT,
4244—F. OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *Oct.* 21, 1890.

Collector of customs, San Francisco, Cal.

SIR: The department is in receipt of your letter of the 11th instant, in which, referring to its telegram to you of the 9th instant, in relation to certain steel rails now in bonded warehouse which have been withheld from sale from time to time at the request of the Oregon Pacific Railroad Company; you state that you understand that said company intends to withdraw the rails and pay the duty thereon in a short time, and you request instructions as to whether the rails will be subject to duty at the rates prescribed by the acts of March 3, 1883, or at the rate prescribed by the act of October 1, 1890.

18 Upon examination of the records of the department it appears that on March 6th, last, Mr. T. E. Hogg, president of said company, made application for permission to withdraw and pay duty on the rails in question from time to time as required for use in the construction of the road before the time of the next regular sale, July, 1890; that the period of three years, from date of importation which they were allowed by law to remain in bonded warehouse expired on March 1, 1890; that this application was granted by telegram to you under date of March 7th, last, and that the time within which such withdrawals might be made was extended for the period of three months by letter addressed to you on June 30th last, and for a further period of six months by a telegram addressed to you on the 9th instant.

In reply I have to state that as the duties regular and additional had legally accrued on said rails before the passage of the act of October 1st, 1890, and the rails remained in bond merely by sufferance and not legally, they do not come within the perview of section 50, of the act of October 1st, 1890, and are not entitled to withdrawal at the reduced rate prescribed by said act.

You are therefore instructed to allow their withdrawal only on payment of the duties regular and additional which had accrued in March last.

Respectfully yours,
(Signed) O. L. SPAULDING,
Assistant Secretary.

No. enclosures, —. 26439 B.

19 *Telegram from Secretary of Treasury to Collector.*

Copy.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *March* 15, 1895.

Collector of customs, San Francisco, Cal.:

Bank of California or properly authorized representatives may, on application, make entry for one lot of not less than five tons steel rails, paying duty under act of eighty-three. In case of such entry, remainder of rails may be withheld from sale. Collect.

——— ———,
Acting Secretary.

Official business, commercial rates. Collect.

EXHIBIT "E."

Letter of Secretary of Treasury to Collector.

4244 F. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *March* 15, 1895.

Collector of customs, San Francisco, Cal.

SIR: The department has had under deliberate consideration an application from the parties in interest for permission to withdraw from your custody, on payment of duty and charges, under the act of August 28, 1894, the steel rails which were imported in 1887, by the Bank of California for the Oregon Pacific Railway Company. The applicants set forth the facts in the history of this case, showing that the rails were duly entered on arrival, and were
20 placed in bonded warehouse where they have continued to remain until now, with the consent of this department, which was given in compliance with the urgent petitions of the importers. The question has been somewhat complicated by the fact that partial deliveries have been made from time to time, and that duties have been exacted under the tariff of 1890, in direct violation of department's instructions to the collector, under date of October 4, 1890.

The department's decision in the question at issue, necessarily involves principles which reach far beyond the special case which forms the subject of this communication. It establishes the statutes of all merchandise which has been suffered to remain in bond beyond the legal period of three years from the date of importation.

A reference to the decisions of the department for a long series of years shows that it has uniformly held that the duties found due on the warehouse bond at the date of its expiration became a debt col-

EXHIBIT "D."

Letter of Assistant Secretary of Treasury to Collector.

Copy.

TREASURY DEPARTMENT,
4244—F. OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *Oct.* 21, 1890.

Collector of customs, San Francisco, Cal.

SIR: The department is in receipt of your letter of the 11th instant, in which, referring to its telegram to you of the 9th instant, in relation to certain steel rails now in bonded warehouse which have been withheld from sale from time to time at the request of the Oregon Pacific Railroad Company; you state that you understand that said company intends to withdraw the rails and pay the duty thereon in a short time, and you request instructions as to whether the rails will be subject to duty at the rates prescribed by the acts of March 3, 1883, or at the rate prescribed by the act of October 1, 1890.

18 Upon examination of the records of the department it appears that on March 6th, last, Mr. T. E. Hogg, president of said company, made application for permission to withdraw and pay duty on the rails in question from time to time as required for use in the construction of the road before the time of the next regular sale, July, 1890; that the period of three years, from date of importation which they were allowed by law to remain in bonded warehouse expired on March 1, 1890; that this application was granted by telegram to you under date of March 7th, last, and that the time within which such withdrawals might be made was extended for the period of three months by letter addressed to you on June 30th last, and for a further period of six months by a telegram addressed to you on the 9th instant.

In reply I have to state that as the duties regular and additional had legally accrued on said rails before the passage of the act of October 1st, 1890, and the rails remained in bond merely by sufferance and not legally, they do not come within the perview of section 50, of the act of October 1st, 1890, and are not entitled to withdrawal at the reduced rate prescribed by said act.

You are therefore instructed to allow their withdrawal only on payment of the duties regular and additional which had accrued in March last.

Respectfully yours,
(Signed) O. L. SPAULDING,
Assistant Secretary.

No. enclosures, —. 26439 B.

19 *Telegram from Secretary of Treasury to Collector.*

Copy.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *March* 15, 1895.

Collector of customs, San Francisco, Cal.:

Bank of California or properly authorized representatives may, on application, make entry for one lot of not less than five tons steel rails, paying duty under act of eighty-three. In case of such entry, remainder of rails may be withheld from sale. Collect.

——— ———,
Acting Secretary.

Official business, commercial rates. Collect.

EXHIBIT "E."

Letter of Secretary of Treasury to Collector.

4244 F. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *March* 15, 1895.

Collector of customs, San Francisco, Cal.

SIR: The department has had under deliberate consideration an application from the parties in interest for permission to withdraw from your custody, on payment of duty and charges, under the act of August 28, 1894, the steel rails which were imported in 1887, by the Bank of California for the Oregon Pacific Railway Company. The applicants set forth the facts in the history of this case, showing that the rails were duly entered on arrival, and were
20 placed in bonded warehouse where they have continued to remain until now, with the consent of this department, which was given in compliance with the urgent petitions of the importers. The question has been somewhat complicated by the fact that partial deliveries have been made from time to time, and that duties have been exacted under the tariff of 1890, in direct violation of department's instructions to the collector, under date of October 4, 1890.

The department's decision in the question at issue, necessarily involves principles which reach far beyond the special case which forms the subject of this communication. It establishes the statutes of all merchandise which has been suffered to remain in bond beyond the legal period of three years from the date of importation.

A reference to the decisions of the department for a long series of years shows that it has uniformly held that the duties found due on the warehouse bond at the date of its expiration became a debt col-

lectable from the proceeds of a sale of the goods or from the sureties on the bond, and that subsequent changes of tariff can neither increase nor decrease the amount of such debt.

The department finds no reason at this time for departing from the ruling above cited, and you are accordingly instructed that the amount of duty to be collected on the goods in question is the amount which was found to be due on final liquidation, and at the date of the expiration of the bond; that is to say, the duty assessed under the act of March 3, 1883.

21 Appreciating the conditions which affect this case, the department is not disposed to inflict unnecessary hardship upon the importers by a summary closure of the matter, and you are therefore authorized to permit the importers if they shall so elect to pay the duties upon and to have delivery of a small portion, say not less than four tons of the above steel rails. It may be that duties will be so paid under protest in order that the exaction of duty may be reviewed by the board of general appraisers. Should this prove to be the case, you are further authorized to delay the sale of the remaining property until a decision has been reached.

Respectfully yours,

(Signed) C. S. HAMLIN,
Acting Secretary.

EXHIBIT "F."

Letter of Secretary of Treasurer to Board.

4244—F. TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April* 9, 1895.

To the president of the general board of appraisers, 125 Bleecker street, New York, N. Y.

SIR: Enclosed herewith please find statement of facts agreed upon between this department and the attorney of the Bank of California, San Francisco, relative to certain importations of steel rails, and to the withdrawal of the same from bonded warehouse.

22 It is understood that J. F. Evans, Esq., the attorney of the bank, will call at your office and sign the statement, which has already been signed by the Secretary of the Treasury. This paper is to be considered an exhibit in the case of the protest which was the subject of a recent review by your board.

Respectfully yours, C. S. HAMLIN,
Acting Secretary.

(One enclosure.) J. A. W. I. M. C.

(Endorsed:) 30048 T, 26439 B. President board U. S. general appraisers. C. S. Hamlin, act'g Sec't'y. Washington, D. C., April 9, '95. Encl. statement of facts for signature of attorney for protestants, etc. Received by board of U. S. general appraisers. April 11, 1895.

EXHIBIT "G."

4244—F.

Statement of Facts in the Case of Steel Rails Imported at San Francisco and Suffered to Remain in Bond Beyond Three Years.

For the purpose of convenient reference and to avoid the necessity of introducing confirmatory testimony before the board of United States general appraisers in the matter of the classification of certain steel rails imported by the Bank of California at the port of San Francisco, California, the following statement is accepted and agreed upon as containing the material facts concerning the importation of and the circumstances affecting the merchandise in question.

The records of the custom-house show that about 5,678
23 tons of steel rails were imported at San Francisco by five different vessels at various dates, as follows:

Per "Troop," March 2, 1887	2,249	tons
" "Yeoman," April 19, 1887	250	"
" "Iron Duke," May 10, 1887	2,051	"
" "Helenslea," May 12, 1887	600	"
" "Garfield," June 24, 1887	528	"
Total	5,678	"

That the merchandise remained in general order, unclaimed, until February 27, 1888, when a warehouse entry for each of these importations was made and bonds given by the Bank of California, as the importer and consignee, the duties secured by said bonds aggregating about $96,557.73; that the bonds so given are numbered 1031, 1033, 1034, 1035 and 1036, of the custom-house series; that the warehouse entries were liquidated under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from date of importation, the additional duty of 10 per cent. prescribed by section 2970, R. S., was charged upon the bonds against the merchandise, amounting to the sum of $9,655.77.

It further appears that four withdrawals were made between September 21, 1888, and December 6, 1889, at the rates thus charged, and the duties paid thereon amounting to $29,192.20; that when the bonded period of three years was about to expire the Oregon Pacific Railroad Company, upon whose account the merchandise had been imported, represented to the Treasury Department
24 that serious casualties had occurred to its road by storms and floods, and consequent embarrassment of its affairs and requested a postponement of the sale required under section 2971, R. S., whereupon, the Secretary authorized the withdrawal of the merchandise from sale for a period of three months, and it appears that this was done without notice to, or the consent of the principal or sureties on the warehousing bonds; that at the expiration of the

three months, a further postponement of six months was authorized by the Secretary; that similar postponements have been renewed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay; the renewal authorized September 16, 1893, having been on condition that sureties shall consent; that by department's letter and telegram to the collector of customs at San Francisco, dated March 15, 1895, the sale of the merchandise was further postponed pending the decision of the board of general appraisers upon a protest of the importers against the payment of duties at the rate prescribed by the act of 1883, which were exacted upon a withdrawal entry made by authority of the department on that date (copy of letter attached).

That under date of June 30, 1890, the department had authorized the collector at San Francisco to permit withdrawals for consumption of steel rails, from time to time, in such quantities as might be desired (copy attached); that on the 21st of October, 1890, in reply to an inquiry from the collector at San Francisco, the department held that withdrawals might be made by the importers, but
25 that the duties, regular and additional prescribed by the act of 1883, had legally accrued on said merchandise on the expiration of the three years prescribed by section 2971, R. S., before the tariff act of 1890 went into effect, and consequently the importers were not entitled to withdrawals at the reduced rates prescribed by the said act.

It further appears that notwithstanding these instructions, twelve withdrawals covering about 3,306 tons were made and duties paid thereon and accepted by the collector at the rate of $13.44 per ton, the rate prescribed by the act of 1890, and the additional duty of 10 per cent. prescribed by section 2970, R. S.

It further appears that about 2,372 tons of steel rails yet remain in bonded warehouse, which have been continuously in the custody of the Government since the date of original importation at the risk and expense of the owners, and that all the charges, including storage, have been paid by the owners up to the present date.

Upon the above state of facts the importers have recently offered to make withdrawal entry and pay the duties on the remainder of the merchandise at the rate prescribed by the tariff act of August 28, 1894. This offer has not been accepted by the Treasury Department, but authority has been given to make a withdrawal entry of a portion of the merchandise at the rate prescribed by the tariff act of 1883, in order that a decision of the board of general ap-
26 praisers and of the court, as to the legal rate of duty chargeable thereon when withdrawn for consumption, may be obtained.

CHARLES S. HAMLIN,
Acting Secretary of the Treasury.

J. M. C.
J. A. M.

J. F. EVANS,
Att'y for Protestants.

EXHIBIT "H."

Letter of Bellingall to Evans.

P. W. Bellingall, ship and custom-house broker, 508 Battery street, opposite post-office; telephone 984.

References: Donohue Kelly Banking Co., Murphy, Grant & Co.; J. N. Knowles, R. Dunsmu-r & Sons, Abner Doble Co., Jas. de Fremery & Co., John Rosenfeld's Sons, R. D. Chandler, Jno. L. Howard.

SAN FRANCISCO, *M'ch 19th*, 1895.

Mr. J. F. Evans, Washington, D. C.

DEAR EVANS: In regard to the steel rails of Oregon Pac. R. R., I want to say as broker for Col. Hoge and the Bank of California, that the extension of time on bonds as mentioned in protest forwarded to board of general appraisers at New York, said extension was granted by Secretary of the Treasury without any intervention of mine.

As to the collection of duties on withdrawals after passage of McKinley bill, I insisted on paying duty in accordance with sec. 50, said bill. No peculiar influence was brought to bear on any
27 official connected with the passing of entries through custom-house, on the contrary, I will remember having called on Spec. Dep. Collector Jerome after I had passed first withdrawal under McKinley act, and called his attention to fact that withdrawal clerk seemed to think there was a question as to rate of duty, whereupon Mr. Jerome asked for instructions from dep'tm't, the reply to his query I never saw, nor heard of to the best of my knowledge and belief, until after the arrival of Special Agent Hanlon and others at this port. I still hold my opinion of the law and am at a loss to see how the department can claim that the goods are not in bond and entitled to withdrawal, same as other goods so long as they admit that they can be withdrawn for consumption.

Respectfully, P. W. BELLINGALL.

Subscribed and sworn to before me this 20th day of March, 1895.

[SEAL.] A. F. DANGLADA,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "J."

Affidavit of George H. Probasco.

I, George H. Probasco of San Francisco, State of California, do hereby certify that I am and have been since July 1, 1887, an employé of P. W. Bellingall, custom-house broker of San Francisco, and in such capacity prepared the custom-house warehouse
28 entry covering an importation of 9,126 steel rails imported by the Bank of California, ex the Br. Sh. "Troop" from Barrow,

arrived Mar. 2, 1887, and more fully described in warehouse entry bond No. 1031 (invoice No. 2733); that all the withdrawals made against this bond No. 1031, were prepared and written by me; that I saw department telegram of M'ch 7, 1890, which permitted these rails to remain in warehouse beyond the limit of three years; that I have seen and am familiar with other orders of like character made at different times by the Treasury Department relative to these rails, and that the withdrawals made by me at the rate of duty in vogue at the time of withdrawal were made in good faith under the impression that said rate was correct and proper; that I discussed with my employer the said P. W. Bellingall of the believed to be erroneous exaction of 10 per cent. additional duty under sec. 2,970, Revised Statutes, and that at no time, by intimation or otherwise, did I know or suspect of the existence of a letter, order or other document showing that these rails should be withdrawn only on the payment of $17.00 per ton, nor did I have any knowledge of the existence of such a document until the arrival here of Special Agents Hanlon and Crites, about June, 1894.

GEORGE H. PROBASCO.

Subscribed and sworn to before me this 18th day of M'ch, 1895.

[SEAL.] A. F. DANGLADA,
Notary Public in and for the City and County of San Francisco, State of California.

29 EXHIBIT "K."

Opinion of General Appraisers.

(G. A.—3054.)

Merchandise as remaining in bonded warehouse more than three years dutiable at the rate in force at the time of withdrawal.

Before the U. S. general appraisers at New York, April 19, 1895.

In the matter of the protest, 26439 *b*–3876, of the Anglo-Californian bank against the decision of the collector of customs, at San Francisco, as to the rate and amount of duties chargeable on certain merchandise, imported per "Troop;" arrived March 2, 1887.

Opinion by SHARRETTS, general appraiser:

We find the material facts in this case to be as follows, to wit:

The Bank of California at various times between March 2, and June 24, 1887, imported into the port of San Francisco, certain (T) steel rails aggregating 5,678 tons. These rails remained in general order unclaimed until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California as importer and consignee. Said warehouse entries were liquidated under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of the importation the additional duty of 10 per cent. prescribed by section 2970, Revised Statutes, was

charged up on the bonds against the merchandise. Between September 21, 1888, and December 6, 1889, four withdrawals for consumption were made and the amount of duties charged
30 thereon was paid. When the bonded period of three years was about to expire the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its road by storms and floods, and requested a postponement of the sale of merchandise required under section 2971, Revised Statutes, whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving due notice to, or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury, September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury, March 25, 1895, pending decision regarding the legal status of the goods by the board of general appraisers. Under date of June 30, 1890, more than three years after the date of importation, the Secretary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question, from time to time, in such quantities as might be desired. On October 21, 1890, the Treasury Department decided that withdrawals might be made under the act of 1890, by the importers, at the rates of duty regular and additional prescribed by the act of 1883. Notwithstanding this decision, 3,306 tons of steel rails were withdrawn for
31 consumption, and in addition to 10 per cent. as prescribed by section 2970, Revised Statutes, duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in act of October 1, 1890. All charges and expenses, including storage charges, have been paid, the importers recently offered to withdraw for consumption the remainder of the merchandise in bonded warehouse at the rate prescribed in paragraph 117, of the act of August 1, 1894. Permission to make such withdrawals has not been granted by the Secretary of the Treasury, but in lieu thereof authority has been given the collector to permit withdrawal entry to be made by the importers of a small portion of the merchandise, at the rates prescribed in the act of March 3, 1883, in order that a test case for judicial decision might be made. In accordance with the authority thus granted entry for consumption of twenty of the steel rails in question (weighing about 5 tons), was made by the importers, and duty was assessed thereon by the collector at $17 per ton, and ten per cent. additional under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers protested, claiming that the merchandise in question having been withdrawn for consumption after August, 1894, was properly dutiable at seven-twentieths of 1 cent per pound in accordance with the provisions of sec-

tion 1 and paragraph 117, of the present act. That protest is now before the board for decision.

With the goods still remaining in bonded warehouse, viz:
32 about 2,370 tons, we are not concerned, we are only to pass upon the rate and amount of duty chargeable upon the twenty steel rails covered by this protest. The Attorney General, under date of January 17, 1895, expressed the opinion that "goods imported and entered for warehouse prior to the act of 1894, and not withdrawn for consumption within three years from the date of original importation are unaffected by the new rates of duty, and the duties mentioned in section 2972, Revised Statutes, are the duties to which they were previously subject, whatever be the construction to be put upon this section in other respects. My opinion applies not only to goods imported within three years before the act of 1894 took effect, but to all goods theretofore imported, and there subject to the tariff rate of 1890." Section 1 of the act of 1894 provides "that on and after the first day of August, 1894, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries or withdrawn for consumption and mentioned in the schedules herein contained the rates of duty which are by the schedules and paragraphs respectively prescribed."

The words "or withdrawn for consumption" are new matter, not appearing in the acts of 1883 or 1890, and there is abundant proof furnished by the debates in Congress to show that they were intended to place all merchandise in bonded warehouses prior to August 1, 1894, and entered for consumption after that date upon a parity with respect to rates of duty with merchandise imported on and after August 1, 1894. The use of the conjunction "or"
33 instead of "and," is in itself persuasive of the intent of Congress in this respect, if not conclusive. There is no provision in the act of 1894 which by terms or even by implication, excludes any class of merchandise withdrawn for consumption after August 1, 1894, from entry at the reduced rates provided for therein.

Section 2970, of the Revised Statutes, was repealed by section 54, of the act of 1890, hence we need not refer to the provisions thereof. Section 2971, provides that any goods remaining in bonded warehouse beyond three years shall be regarded as abandoned to the Government, and sold under such regulations as the Secretary of the Treasury may prescribe, etc. The right of the Secretary of the Treasury to have authorized the sale of all the steel rails remaining in bonded warehouse more than three years after importation cannot be questioned, but the fact is that the twenty steel rails in question were not sold nor listed for sale, and that they were with his advice and consent withdrawn for consumption after August 1, 1894. Article 1031, Treasury Regulation for 1884, would seem to justify the Secretary of the Treasury in electing to permit withdrawal of the merchandise for consumption, instead of decreeing its sale. This point, however, in our opinion, is not a factor in the case.

It is not within our jurisdiction to pass upon the validity of the importer's entry. We can only pass upon the issue raised by this protest, and hold that the twenty steel rails in question, have been withdrawn for consumption after August 1, 1894, are dutia-
34 ble at seven-twentieths of 1 per cent. per pound under the provision of paragraph 117, act of 1894, for T rails.

The protest is sustained and the collector's decision is reversed.

WILBUR F. LUNT.
J. B. WILKINSON, JR.
THAD. S. SHARRETTS.

And for a certified statement of facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits here attached.

WILBUR F. LUNT,
J. B. WILKINSON, JR.,
THAD. S. SHARRETTS,
Board of U. S. General Appraisers.

(Endorsed:) U. S. circuit court. No. 12070. In the matter of the application of The Anglo-Californian Bank for a review of the decision of the board of U. S. general appraisers as to the rate and amount of duty on certain imported merchandise. Return of the board of U. S. general appraisers. Filed June 18, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

35 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

The petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York, State of New York, in matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited, at the same place.

Findings of Fact and Conclusions of Law.

This case and proceeding having come on regularly for hearing before the court in the matter provided by law and the act of June 10, 1890; and the court, after duly considering the evidence and the law, and being fully advised in the premises, having heretofore given and rendered its opinion herein; now, in accordance there-

with, hereby makes and renders its decision, finding the following facts and conclusions of law respecting the classification of the merchandise involved herein and the rate of duty imposed thereon under such classification:

36 *Findings of Fact.*

1.

The Bank of California, at various times between March 2, and June 24, 1887, imported into the port of San Francisco, certain (T) steel rails aggregating 5,678 tons.

2.

These rails remained in general order unclaimed, until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California, as the importer and consignee. Said warehouse entries were liquidated under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of importation, the additional duty of 10 per cent. prescribed by section 2970, Revised Statutes, was charged upon the bonds against the merchandise.

3.

Between September 21, 1888, and December 6, 1889, four withdrawals for consumption were made, and the amount of duties charged thereon was paid. When the bonded period of three years was about to expire, the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its roads by storms and floods, and requested a postponement of the sales of merchandise required under section 2971, Revised Statutes, whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving
37 due notice to, or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months, up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury, September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury, March 25, 1895, pending decision regarding the legal status of the goods by the board of general appraisers.

4.

Under date of June 30, 1890, more than three years after the date of importation, the Secretary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question, from time to time, in such quantities as might be desired. On October 21, 1890, the Treasury Department decided

that withdrawals might be made by the importers, at the rates of duty regular and additional prescribed by the act of 1883. Notwithstanding this decision, 3,306 tons of the steel rails were withdrawn for consumption, and in addition to 10 per cent. as prescribed by section 2970 Revised Statutes, duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in the act of October 1, 1890.

5.

All charges and expenses, including storage charges, having
38 been paid, the importers, on the 8th day of February, 1895, offered to withdraw for consumption the remainder of the merchandise in bonded warehouse, at the rate prescribed in paragraph 117 of the act of August 28, 1894. Permission to make such withdrawal was not granted by the Secretary of the Treasury, but in lieu thereof authority was given the collector to permit withdrawal entry to be made by the importers of a small portion of the merchandise, at the rates prescribed in the act of March, 3, 1883, in order that a test case for judicial decision might be made as to the rates of duty properly chargeable.

6.

In accordance with the authority thus granted, entry for consumption of twenty of the rails in question (weighing about 5 tons), was made by the importers March 16, 1895, and duty was assessed thereon by the collector, at $17 per ton, and 10 per cent. additional, under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers have duly protested, claiming that the merchandise in question, having been withdrawn for consumption after August, 1894, was properly dutiable at seven-twentieths of 1 cent per pound, in accordance with the provisions of section 1, and paragraph 117, of the present act of August 28, 1894.

39 *Conclusions of Law.*

As conclusions of law the court finds:

I.

That at the expiration of three years from the time of its original importation, to wit: on the 24th day of June, 1890, the merchandise in question became abandoned to the United States, and subject to sale as such, under sections 2970, 2971 and 2972, U. S. Revised Statutes, to satisfy the duties and charges thereon then in force, to wit: the duty of $17 a ton, under paragraph 147 of the tariff act of March 3, 1883, and 10 per cent. thereon with warehouse charges.

II.

The right of the United States to sell said merchandise at said time, and deduct from the proceeds thereof said amount of duties and charges, was a right accrued at said time to the United States,

and a liability incurred by said merchandise, and the importer thereof, within the meaning of section 29 of the customs administrative act of June 10, 1890; section 55 of the tariff act of October 1, 1890, and section 72 of the tariff act of August 28, 1894, and hence was preserved to the United States by said acts, and is now in full force and effect.

III.

That said section 2971, U. S. Revised Statutes, was and is not repealed or modified by said customs administrative act of June 10, 1890, in section 20 thereof, as amended, nor by said tariff act of October 1, 1890, in section 50 and 54 thereof, the latter amending said section 20, nor by said tariff act of August 28, 1894, in its enacting clause, but is now, and since its enactment, has been in full force and effect and the amount of duty and charges properly assessed against, and collected thereunder from the proceeds of the sale of said goods, or from the importer thereof, by the collector of customs for the port of San Francisco, California, are those in force at the said time of abandonment, to wit: the 24th day of June 1890, as provided in said tariff act of March 3, 1883.

IV.

That the withdrawal entry of said merchandise was properly liquidated by said collector of customs, and the amount of duties and charges exacted and collected by said collector upon the withdrawal of said merchandise from bond, to wit: the sum of $92.20 was lawfully exacted and collected.

V.

That the decision of the board of U. S. general appraisers herein is reversed and set aside, and the petitioner herein is entitled to a judgment therefor, with the costs against said importers.

Let judgment be entered in accordance therewith.

Dated November, 1895.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed:) Filed November 7, 1895. W. J. Costigan, clerk.

41 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

The petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10th, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York, State of New York, in the matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of said San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited, at the same place. No. 12070.

Judgment.

This matter came on to be tried before the court upon the petition, report of the United States general appraisers, and argument of counsel duly heard and considered, and the court having found the facts and conclusions of law therefrom, and the same having been filed, ordered that judgment be entered in accordance therewith.

Wherefore, by virtue of the law and the findings aforesaid, it is ordered, adjudged and decreed that the decision of the board of United States general appraisers herein, be, and hereby is reversed and set aside, and that said petitioner, the Secretary of the
42 Treasury of the United States, have and recover from the Bank of California, importers of the merchandise referred to in this matter, his costs and disbursements incurred in this matter, amounting to the sum of $34.85.

Entered this 7th day of November, A. D. 1895.

W. J. COSTIGAN, *Clerk.*

A true copy.
Attest: W. J. COSTIGAN, *Clerk.*

In the Circuit Court of the United States, Ninth Judicial Circuit in and for the Northern District of California.

In the matter of the application of the Secretary of the U. S. Treasury for a review of decision of U. S. general appraisers relative to certain 20 steel rails., etc. No. 12070.

Certificate to Judgment-roll.

I, W. J. Costigan, clerk of the circuit court of the United States of the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled matter.

Attest my hand and the seal of said circuit court this 7th day of November, 1895.

[SEAL.] W. J. COSTIGAN, *Clerk.*

(Endorsed:) Judgment-roll. Filed November 7, 1895. W. J. Costigan, clerk.

43 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the matter of the petition of the Secretary of the Treasury for review of a decision of the board of United States general appraisers relative to certain twenty steel rails. No. 12070.

Opinion.

Before the Honorable Joseph McKenna, circuit judge.

H. S. Foot, Esq., United States attorney, and Samuel Knight, Esq., assistant U. S. attorney, for petitioner; Charles A. Garter, Esq., and J. F. Evans, Esq., for respondents.

MONDAY, *September 16th*, 1895.

McKENNA, *Circuit Judge:*

The facts of the case are stipulated by the parties and are cited in the opinion of the board of appraisers as follows: "The Bank of California at various times between March 2, and June 24, 1887, imported into the port of San Francisco certain (T) steel rails, aggregating 5,678 tons. These rails remained in general order unclaimed until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California as the importer and consignee. Said warehouse entries were liquidated under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of importation the additional duty of 10 per cent. prescribed by section 2970, Revised Statutes, was charges upon the bonds against the merchandise. Between September 21,
44 1888, and December 6, 1889, four withdrawals for consumption were made and the amount of duties charged thereon was paid. When the bonded period of three years was about to expire the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its road by storms and floods, and requested a postponement of the sale of merchandise required under section 2971, Revised Statutes, whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving due notice to or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury March 25, 1895, pending decision regarding the legal status of the goods by the board of general appraisers. Under date of June 30, 1890, more than three years after the date of importation, the Sec-

retary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question, from time to time, in such quantities as might be desired. On October 21, 1890, the Treasury Department decided that withdrawals might be made under the act of 1890, by the importers, at the rates of duty regular and additional prescribed by the act of 1883. Not-
45 withstanding this decision, 3,306 tons of the steel rails were withdrawn for consumption, and in addition to 10 per cent. as prescribed by section 2970 Revised Statutes, duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in the act of October 1, 1890. All charges and expenses, including storage charges, having been paid, the importers recently offered to withdraw for consumption the remainder of the merchandise in bonded warehouse at the rate prescribed in paragraph 117 of the act of August 1, 1894. Permission to make such withdrawal has been granted by the Secretary of the Treasury, but in lieu thereof authority was given the collector to permit withdrawal entry to be made by the importers of a small portion of the merchandise at the rates prescribed in the act of March 3, 1883, in order that a test case for judicial decision might be made. In accordance with the authority thus granted, entry for consumption of twenty of the rails in question (weighing about 5 tons) was made by the importers, and duty was assessed thereon by the collector at $17 per ton and 10 per cent. additional under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers protested, claiming that the merchandise in question having been withdrawn for consumption after August, 1894, was properly dutiable at seven-twentieths of 1 cent per pound in accordance with the provisions of section 1, and paragraph 117 of the present act."

The tariff act of 1883 was in force at the time of the im-
46 portation of the rails, and continued in force until the enactment of the act of 1890, known as the McKinley bill. Under the latter act, the duty was made $13 per ton, and under the act of August, 1894, known as the Wilson act, it was made $7.84.

As is well known, imported merchandise could be entered for immediate consumption, or it could be entered for warehousing; and in the latter case were certain provisions of law applicable to it.

Section 2970, R. S., provided for the periods for which, and the terms upon which merchandise could remain in bond without paying duty. It could remain for one or three years, and during such times it could be withdrawn for consumption. If in one year, "on payment of the duties and charges, to which it may be subject by law at that time." If after one year, and before the expiration of three years, "on payment of the duties assessed on the *original entry and charges*, and an additional duty of ten per centum of the amount of such duties and charges. (The italics are mine.) After three years the permission to withdraw goods for consumption expired, and section 2971, provided that "any goods remaining in public store, or bonded warehouse beyond 3 years, shall be regarded as abandoned to the Government, and sold under such regulations as

the Secretary of the Treasury may prescribe, and the proceeds paid into the Treasury." But section 2972, provided that the Secretary in case of sale may pay to the owner, &c., the proceeds thereof after deducting duties, charges and expenses.

In 1890, Congress enacted a law to simplify the collection of revenues, called the administrative act, section 20, of which
47 provided for the withdrawal for consumption of bonded goods, which was amended by section 54, of the McKinley act. The section as amended is as follows, omitting a proviso with which we are not concerned: "That any merchandise deposited in bond, in any public or private bonded warehouse may be withdrawn for consumption within 3 years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal." The difference between this section and section 2970 of the R. S., is that it makes but one period—3 years, and provides that the goods withdrawn any time within it shall be subject to the duty then provided by law. This act contained no provision for goods not withdrawn within 3 years, nor did the administrative act have such provision. If left provided for at all, it was by sections 2971 and 2972 R. S., *supra*. The administrative act explicitly repealed a number of sections of the R. S., but not those sections, and added "and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

"But the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done or any right accruing or accrued * * * but all liabilities under said law shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. * * *"

Section 50 of the McKinley act, which is the only other one necessary to quote in full, is as follows:

"SEC. 50. That on and after the day when this act shall go into effect all goods, wares and merchandise previously imported,
48 for which no entry has been made, and all goods, wares and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day: Provided, that any imported merchandise deposited in bond in any public or private bonded warehouse, having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: Provided, further, that when duties are based upon the weight of merchandise deposited in public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

The act also repealed all prior inconsistent laws, but saved all

rights which had accrued, by the same words as the administrative act, *supra*.

The Wilson act contained no administrative provisions with which this case is concerned. A claim however, is based on its first section, which will be referred to hereafter.

From this statement of the facts and the statutes, the question is, to what duty was the merchandise subject? The Secretary of the Treasury decided that of the act of 1883, or $17 per ton, and on the grounds which apply to the whole importation. The board
49 of appraisers decided that of 1894, or $7.84 per ton, but on grounds which confine the decision to 20 rails, or 5 tons only. This is to be regretted, as it leaves us without the views of the board (necessarily valuable) of the regulations of the act of Congress.

The board bases its decision on the act of the Secretary in authorizing the withdrawal of the merchandise for consumption, but the stipulation of the parties is that this was to enable the right to be tested, not to make the right. Besides, if the importers can claim this against intention, the difficulties of the matter are not solved or even evaded. The question then occurs, what right has the Secretary to permit a withdrawal for consumption, under the circumstances, or if he have this right as an alternative of a sale, at what duty; and the question can only be answered by determining the changes which the McKinley and Wilson acts make in pre-existing laws. Necessarily therefore, a decision as to the five tons involved in this case is a test of the whole importation, and I have given the contentions of parties a proportionate attention.

The merchandise as we have seen was imported in 1887, and entered for warehousing Feb. 27, 1888, and the duties liquidated under the act of 1883, and a bond given by the importers to secure their payment. Under the law the rights and liabilities of the importers were very plain. They could have withdrawn the merchandise for consumption in one year upon paying the duties, to wit: $17 per ton—that being the duty they were subject to, the law of 1883 being then in force. Or, after said year and within three years from June, 1887 (the date of the last importa-
50 tion), they could have withdrawn the merchandise upon paying such duty, and 10 per cent. additional duty. Some of the merchandise was withdrawn before the expiration of three years, and the duties paid, but the greater part of it, including the rails in controversy, was not withdrawn, and on the 24th day of June, 1890, became subject to sections 2971, 2972 and 2973 of the Revised Statutes, *supra*. In other words, became to be regarded as abandoned to the Government, and to be subject to sale by the Secretary of the Treasury to satisfy the then duty, to wit: $17 and 10 per cent. additional and charges. This was the status at that date—the right of the Government—the liability of the merchandise indisputably, and were only not exacted or enforced because the Oregon Pacific Railway Co., for whose account the merchandise was imported, requested a postponement of the sale for three months, representing that serious casualties had occurred to its road. Other postponements by like request, the sureties on warehouse bond consenting, for periods

of six months were given. Pending these periods the tariff acts with the provision *supra*, were passed.

The question raised by these facts is direct. Did the right which undoubtedly accrued on the 24th of June, 1890, continue after the passage of the McKinley and Wilson acts. Or, using saving language—was it not, regarding the Government, "a right accruing or accrued"—was it not regarding the merchandise "a liability under a prior law," continued under said acts.

It seems necessarily that the answer must be in the affirm-
51 ative. The Government had a right in the juridical sense of that word, that is an enforceable claim. It came into existence in June, 1894, and existed for nearly two months before the passage of the administrative act, and might have been enforced during such time, but for the solicitation of the parties interested in the merchandise, or at any rate, could have been enforced. It was a right "accruing or accrued," therefore, in the legal and proper sense of those words, and presumably in the sense in which they were intended by such act and the McKinley act.

Prior to the decision of the Supreme Court in U. S. *vs.* Burr, — Supreme Court Reporter, page 1002, it could have been plausibly contended that the rights saved by the act were not those of the United States or not claims to duties, and the former was so held by the circuit court (66 Fed., 742). The Supreme Court, however, took a different view, and held that the act preserved the rights of the Government as well as the rights of the importers and included claims to duties.

The conflict settled in that case was between the McKinley and Wilson acts, and the merchandise in controversy arrived Aug. 7, 1894, duties were paid Aug. 8th, and the merchandise delivered Aug. 11th, but it was not until Aug. 28th, that the fact was stamped on the entry that the goods were liquidated as entered. The Wilson act went into effect Aug. 28th, but its first section provided "that on and after the 1st day of August, 1894 * * * there shall be levied and collected * * * the rates of duty
52 which are by the schedules and paragraphs respectively prescribed." * * * And it was contended from the plain language the court was imperatively required to conclude that it was the intention of Congress that the act should have a retrospective operation as of August 1st, although it did not become a law until that date. The court refused to make this literal application of the words of the statute and said through Chief Justice Fuller:

"And upon the threshold we are met with the fact that the act of October 1, 1890, was not repealed in terms until August 28, 1894; and that the repealing section of the latter act kept in force every right and liability of the Government or of any person which had been incurred or accrued prior to the passage thereof, and thereby every such right or liability was excepted out of the effect sought to be given to the first section."

"The right of the Government to duties under the tariff law, which existed between August 1st, and August 28th, was a right accruing prior to the passage of the act of 1894 (that is, the date

when the bill became a law); and the obligation of the importers between August 1st and August 28th, to pay the duties on their entries, under the existing tariff law, was a liability under that law arising prior to the passage of the act of 1894; and, if Congress intended that section 1 should relate back to August 1st, still the intention is quite as apparent that the act of October, 1890, should remain in full force and effect until the passage of the new act on
August 28th, and that all acts done, rights accrued, and lia-
53 bilities incurred under the earlier act, prior to the repeal,
should be saved from the effect thereof as to all parties interested, the United States included."

This construction satisfies the natural meaning of the language of the acts, and gives effect, and consistent effect to every provision. But without the provisions of the acts, saving rights and continuing liabilities accruing or accrued under prior laws, it is disputable if the contention of the importers could be sustained under the ruling in Fabri, *vs.* Murphy, 95 U. S., 191.

In that case it appeared that sugar was imported in Nov. 1869, which was entered for warehousing. It was classified under the law then in force as No. 12 Dutch standard, and the duty of 3 cents per pound assessed against it. While it was in the warehouse and before the expiration of a year, the act of Dec. 22, 1870, was passed, providing for a lower rate of duty, and making it applicable to goods in bonded warehouse upon the entry thereof for consumption. Under this act the sugars were reclassified by appraisers as No. 7 Dutch standard, and a rate of entry noted at $1\frac{3}{4}$ cents per pound. On the 20th of January, 1871, the importers made a withdrawal entry of the sugars for consumption, and the collector charged them with the lesser duty of the act of 1870, but exacted as a penalty 10 per cent. additional of the duties which had been assessed on the original entry. At the time of the original entry the act of March 14, 1866, was in force. This was the original of section 2970, R. S.,
and provided that goods could be withdrawn for consump-
54 tion within one year from the date of original importation on
payment of the duties and charges to which they may then be subjected by law. After a year, and before the expiration of three years they could be so withdrawn on payment of the duties assessed on the original entry, and charges and an additional 10 per cent. of the amount of such duties and charges.

Payment of the original duty was made without objection, but protest was made against payment of the ten per cent., and suit was instituted to recover the amount. Judgment went against the importers, and it was affirmed by the supreme court.

There was no express repeal of the old act, but its consistency or inconsistency with the new one was directly presented for decision. The supreme court held that there was no inconsistency. Mr. Justice Clifford, speaking for the court, repeating the rule of Wood *vs.* United States, 16 Pet. 342, said that to work a repeal of an old law there must be a positive repugnancy between it and the new one, and further said that such repeal is not favored in any case and must always meet with disfavor where the attempt is made to ap

ply the principle in the construction of revenue laws of the United States.

"Acts of Congress," the learned judge also said, "are often very complex in their provisions in order to enable those charged with their execution to protect the Treasury against the constant attempts of importers to evade the payment of new duties or increased taxation. New regulations often become necessary to enable officers of the customs to defeat such designs; and the rule is that in
55 such cases there ought to be a manifest and irreconcilable repugnancy to warrant the conclusion, that the old law is abrogated, or that the new law was intended to supersede the antecedent provision. Aldridge *v.* Williams, 3 How., 9; The Distilled Spirits, 11 Wall. 256."

Counsel for claimants, cites to sustain his contention, *In re* Schmid, 54 Fe*b.* 145, and U. S. *vs.* Abbott, 20 Court of Claims Rep. 281.

The facts in *In re* Schmid, were not the same as the facts of the case at bar. In that case the merchandise was imported, and entered Jan. 10, and March 9, 1889, and remained in warehouse until Jan. 1891—in other words, the time during which it could be withdrawn, the consumption had not expired, hence it was in one of the classes of sec. 50, of the McKinley act, that is, was under bond for warehousing (to quote the language of the section), and subject to withdrawal for consumption, upon which act and time, the duties were to be levied, as of October 1st, 1890.

This distinguishes the case from the case at bar. In the case at bar the time within which the steel rails could have been withdrawn had expired fully under the law to which they were subject when imported, and before the enactment of the administrative or McKinley acts, and therefore the Government's claim was a "right accrued," and saved by the provision of those statutes that then repealing clauses or modifications should not affect "any right accruing or accrued."

It is certainly the duty of interpretation to give effect to these provisions as well as to sec. 50, and both can only be given effect by respectively applying them to the different conditions
56 recognized or created by the law. The former where rights have accrued against the merchandise—the latter where it is still subject to the demand of the importers. The difference in the conditions may be less substantial under the late acts than under the prior ones, but they are still maintained.

The administrative act (sec. 20), and the McKinley act (sec. 54), which amended it, provide for a bonded period of 3 years, and neither repeal sec. 2971 of the R. S. which provides for abandonment of the merchandise and the right of the Secretary of the Treasury to sell it.

In Abbott *vs.* U. S., the fact as to the time the merchandise was in the warehouse is the same as the case at bar, that is, it remained there more than three years after its importation. The question came up on a refund of duties, they having been paid within the three years. This, however, makes no difference in principle, and the case sustains the contention of the importers. It, however, seems

not to have been very well considered. It involved the construction of sec. 10 of the tariff act of 1883, and sections 2970 and 2971 of the R. S., *supra*. Sec. 10 of the act of 1883 was a repetition of the act of 1870, and section 2970, of the R. S., was a substantial repetition of the act of March 14, 1866. In Fabri *vs.* Murphy, *supra*, both acts were passed on and held consistent, and hence, both in force; and the additional duties prescribed by the latter, legal. If the provisions of the acts were consistent in 1870, they were consistent in 1885. Fabri *vs.* Murphy, does not ap-
57 pear to have been drawn to the attention of the Court of Claims. The decision no doubt responded only to the points presented, and in the manner presented, and hence, took only a partial view of the statutes. The court seemed to be controlled by what it deemed the all-embracing language of section 10, of the act of 1883, and conceived that because the proceeds of the sale of merchandise derelict under section 2971, were not absolutely forfeited, the Government could not have any rights in it at all, a view which ignored, even if it could be otherwise sustained, sec. 13, of the act of 1883, which provided, "that the repeal of existing laws or modification thereof, embraced in this section, shall not affect any act done or right accrued * * * before the said repeal or modifications; but all rights and liabilities under said laws shall continue, and may be enforced in the same manner as if said repeal or modifications had not been made." * * *

The claimants contend that the Wilson act is even more comprehensive and conclusive than the McKinley act, and determines the rate of duty to be collected on the rails in controversy at $7.84 a ton.

The first section which is relied on, is as follows:

"Be it enacted, &c. That on and after the first day of August, 1894, unless otherwise specifically provided for in this act, there shall be levied and collected and paid upon all articles imported from foreign countries or withdrawn for consumption and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed, namely: * * *

58 "117. Railway bars made of iron or steel, and railway bars made in part of steel T rails and punched iron or flat rails, seven-twentieths of one cent. per pound."

Section 72 repealed prior inconsistent laws, but preserved rights and liabilities which had accrued or arisen thereunder substantially in the same language quoted from the administrative and McKinley acts, *supra*.

The efficiency of the section to the contention is in the words "withdrawn for consumption." But what they mean has already been sufficiently explained. As we have seen all the acts provided a period during which goods could remain in bond—they all fix it at three years, and it is only within this period that goods may be "withdrawn for consumption," and hence it is to this period and to what may be done within it that the language of the section must be regarded as addressed. By so regarding it, no policy of the new

act is disappointed, as urged by counsel for claimant. Its policy undoubtedly was to reduce rates, but it was consistent—indeed suitable—to have considered some things as done, some rights having accrued, and to leave them undisturbed. Besides, we know that the authors and advocates of the measure in the House of Representatives did not deem that its policy depended upon the use of the words "withdrawn for consumption" in the situation in which we find them in the act. They were inserted in the Senate. Does the debate there show their purpose?

59 Counsel says that it shows agreement between Senators "presenting," to quote counsel, "all shades of opinion on tariff policy on the following propositions: (1) that there should be the same rate for goods in bond as for those to arrive; (2) that goods withdrawn from bond should pay the same rate of duty as others; and (3) that the words of the amendment would certainly insure these objects." Senator Hale, however, who participated in the debate, and who ought to have been in the center of its certainty and light—charged, without distinguishing by shades of tariff opinion, the most veteran Senators with diversity on every proposition concerning the amendment, and said, "While there is not anything partisan in the four simple words 'or withdrawn for consumption,' yet there were as many theories advanced as to what the amendment meant and whether it ought to be in the bill or out, and as to whether it is found in some other section of some other law, as there were Senators who rose in their seats to discuss the matter." And addressing the advocates of the measure specially, he said: "But let us at least be relieved from uncertainty about what ought to be the plainest provision, and appeal to the Senator from Missouri (Mr. Vest), and through him to the Senator from Arkansas (Mr. Jones), and through both of them, to the Senator from Tennessee (Mr. Hawes), and through all three of them, to the Senator from Texas (Mr. Mills), to let this matter go out for the present, and get together about the table in the room of the Committee on Finance, call in experts from both sides, and give us some language that is authoritative and the meaning of which we know."

60 But assuming that agreement on the proposition stated by counsel may be discerned in the debate, it may also be discerned what was meant by being "in bond," and "withdrawn for consumption," and that the amendment was only the repetition of existing law, these give us some guide to the meaning, and show that its general language was addressed to, and intended to provide for a well-known condition, and was not intended to assimilate all conditions. See remarks of Senators Aldrich, Jones, Vest, Allison and Sherman, Congressional Record, May 10, 1894, page 5430 *et seq.*

A question identical with the one at bar arose under the act of 1883, and was decided by Attorney General Brewster, in accordance with views herein expressed (17 Attorney General's Opinion-, 650). See also opinion of Attorney General Olney of January 17, 1895, substantially to the same effect.

I think, therefore, that the rails in controversy became subject to duty under the act of 1883, and to such duty the Government had acquired a right before the passage of the McKinley and Wilson acts, which was preserved and continued by them.

The decision of the board of general appraisers is, therefore, reversed.

(Endorsed:) Opinion. Filed September 16, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

61 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit, in and for the Northern District of California.

THE SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondent and Appellant.
No. 12070.

Petition for Order Allowing Appeal.

In the matter of the petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York, State of New York, in matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank (Limited) at the same place.

The above-named respondent, The Anglo-Californian Bank, (Limited), conceiving itself aggrieved by the judgment and
62 decision made and entered on the 7th day of November, A. D. 1895, in the above-entitled matter, does hereby appeal from said judgment and decision to the United States circuit court of appeals for the ninth circuit for the reason that said judgment and decision was made and entered in a proceeding relative to the customs revenue laws of the United States, and many other cases now pending depend upon the final judgment in the present proceedings as precedents, and the records in this case show that the question involved is of such importance as to require a review of the judgment and decision of said circuit court by the circuit court of appeals, and for the further reasons specified in the assignment of errors which is filed herewith, and it prays that an appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said judgment and decision was made, duly au-

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thenticated, may be sent to the said United States circuit court of appeals.

CHAS. A. GARTER,
Attorney for Respondent and Appellant.

63 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit, in and for the Northern District of California.

In the Matter of The SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondents *for* Appellant.

Assignment of Errors on Appeal.

Now on this 4th day of December, A. D. 1895, comes the above-named appellant and respondent, by Charles A. Garter, its attorney, and says that the court erred in making the following conclusions of law, to wit:

1. The court erred in its first conclusion of law, which is as follows, to wit:

"That the merchandise involved in this controversy became abandoned to the Government within the meaning of the law, and section 2971, U. S., at the expiration of three years from the date of its original importation; and, at the time of its withdrawal from bond, as aforesaid, such merchandise was such abandoned goods and was liable to be sold under the provisions of section- 2971, 2972, U. S., R. S."

2. The court erred in its second conclusion of law, which is as follows, to wit:

64 "That such merchandise upon its withdrawal from bond aforesaid, was subject to the rates of duty in force at the time of its abandonment, as contained in the tariff act of March 3, 1883, and section 2970, U. S., R. S., regardless of changes in tariff schedules contained in the tariff acts of October 1, 1890, and August 1, 1894, subsequent to such abandonment."

3. The court erred in its third conclusion of law, which is as follows, to wit:

"That said rails are dutiable upon such withdrawals at the rate of $17.00 a ton, under paragraph 147 of said tariff act of March 3, 1883, and such warehouse charges as may have by law accrued thereon, together with ten per cent. of such duties and charges additional thereto, under section 2970, U. S., R. S."

4. The court erred in its fourth conclusion of law, which is as follows, to wit:

"That the decision of the board of U. S. general appraisers herein is reversed, and the amount of duty exacted by the collector of customs for the port of San Francisco, upon the withdrawal of said

merchandise from bond, was lawfully exacted, and the collector of customs for the port of San Francisco should, and he is hereby directed to liquidate the withdrawal entry of said steel rails accordingly."

That the judgment and decision in the above-entitled matter is erroneous, and against the just right of said respondent for the following reasons:

65 1. In that it is ordered, adjudged and decreed that the decision of the board of the United States general appraisers should be reversed, and that the merchandise covered by the decision of the said board of general appraisers should be classified for duty under act of March 3, 1883, at the rate of seventeen ($17) dollars per ton, and ten per centum additional thereon, under section 2970 of the Revised Statutes of the United States.

2. In that said court did not make a judgment or decree affirming the decision of the board of United States general appraisers herein, and adjudged that the said merchandise should be classified for duty at seven-twentieths of one cent per pound, under paragraph 117, Schedule "C," of the tariff act of August 28, 1894, as railway bars specially provided for therein.

3. In that said court did not hold and decide that the merchandise involved herein was legally in bonded warehouse at the time of its withdrawal for consumption, and that the Secretary of the Treasury was vested with legal authority to authorize its withdrawal for consumption.

4. In that said court held and decided that the tariff act of March 3, 1883, has not been repealed by subsequent legislation, and that section 2970 of the United States Revised Statutes has not been repealed.

66 5. Because the said judgment and decision is not supported by the findings of fact of the court, but is against and contrary to said findings and contrary to law.

6. Because the said judgment and decision is not supported by the findings of fact of the court, but is against and contrary to said findings and contrary to law in this, that the findings show that the merchandise involved was withdrawn for consumption on the 15th day of March, 1895—that is, after August 28, 1894, at which last-mentioned date an act of Congress, entitled "An act to reduce taxation, to provide revenue for the Government and for other purposes" went into effect and was in force at the time of said withdrawal; and the rate of duty, seven-twentieths of one cent per pound, prescribed by said last-mentioned act applied to said merchandise.

7. The said judgment and decision is erroneous and contrary to law in that it purports to make applicable to said merchandise the rate of duty prescribed by the tariff act of March 3, 1883, and an additional duty of 10 per cent. prescribed by section 2970 of the Revised Statutes of the United States, whereas the said last-mentioned act and said section 2970 had been repealed at the time of said withdrawal for consumption, and the provisions thereof did not apply to said merchandise.

8. The said judgment and decision is erroneous in form and con-

trary to law in this, to wit: it purports to be a judgment of reversal of a decision of the board of appraisers, and does not in terms prescribe the rate or amount of duty to be levied and collected upon the merchandise involved.

67 Wherefore, the said respondent prays that the said judgment and decision of the said circuit court be reversed by said circuit court of appeals of the ninth circuit, and that said circuit court be directed to enter a judgment and decision in accordance with law upon the facts as they appear in said findings.

CHAS. A. GARTER,
Attorney for Respondent.

(Endorsed:) Petition on appeal and assignment of errors. Due service of within petition for appeal and assignment of errors admitted this 4th day of Dec., 1895. H. S. Foote, U. S. att'y, and attorney for appellee. Filed December 4, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit, in and for the Northern District of California.

In the Matter of THE SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondent and Appellant.

Order Allowing Appeal.

The Anglo-Californian Bank, Limited, the above-named respondent, having on this day presented its petition for appeal from

68 the judgment and decision of this court heretofore, to wit, on the 7th day of November, A. D. 1895, made and given and rendered in the above-entitled matter, and having at the same time filed its assignment of errors, and it satisfactorily appearing to me that the question involved is of such importance as to require a review of such judgment and decision, by the circuit court of appeals, of the United States, of the ninth circuit.

It is hereby ordered that such appeal be, and the same is hereby allowed, as prayed for;

That said respondent give bonds in the sum of $500, with two sufficient sureties, conditioned to answer all damages, to make its plea good and prosecute the appeal to effect, and conditioned in all respects according to law.

That thereafter upon the filing and approval of said bond, a transcript of records, proceedings and papers upon which the judgment and decision herein was rendered duly authenticated, be sent to the United States circuit court of appeals for the ninth circuit.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed:) Due service of within order granting appeal admitted this 4th day of Dec., 1895. H. S. Foote, U. S. att'y, and attorney for appellee. Filed December 4, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

69 THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit in and for the Northern District of California.

In the Matter of THE SECRETARY OF THE TREASURY, Petitioner and Appellee, vs. THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondent and Appellant.	No. 12070.

Bond on Appeal.

Know all men by these presents, that we, the Anglo-Californian Bank, Limited, as principal, and Ignatz Steinhart and Elbridge Durbrow, as sureties are held and firmly bound unto the Secretary of the Treasury of the United States, in the full and just sum of five hundred dollars, to be paid to the said Secretary of the Treasury of the United States, his successors in office and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 4th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a session of the circuit court of the United States, in and for the ninth circuit, northern district of California, in a suit and matter depending in said court, between the Anglo-Californian Bank, Limited, and the Secretary of the Treas-
70 ury of the United States, a judgment and decision was rendered against the said The Anglo-Californian Bank, Limited, and the said The Anglo-Californian Bank, Limited, having obtained an appeal to the United States circuit court of appeals of the ninth circuit, and filed a copy thereof in the clerk's office of said court, to reverse the judgment and decision in the aforesaid matter, and a citation having been issued directed to the said Secretary of the Treasury, citing and admonishing him, to be, and appear at a session of the said circuit court of appeals, for the ninth circuit, to be holden at the city and county of San Francisco, in said circuit, on the 3rd day of January next.

Now the condition of the above obligation is such, that if the said The Anglo-Californian Bank, Limited, shall prosecute said appeal to effect and answer all damages and costs, if it fail to make the said

plea good, then the above obligation to be void, else to remain in full force and virtue.

THE ANGLO-CALIFORNIAN BANK, L'D,
By P. N. LILIENTHAL, *Manager.*
IGNATZ STEINHART.
ELBRIDGE DURBROW.

Signed and sealed in the presence of—
JESSE W. LILIENTHAL.

Approved by—
JOSEPH McKENNA,
Circuit Judge.

71 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

Ignatz Steinhart and Elbridge Durbrow, each being duly sworn, deposes and says, that he is a householder, residing in said city and county of San Francisco, State aforesaid, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all his just debts and liabilities.

Subscribed and sworn to before me this 4th day of December, 1895.

IGNATZ STEINHART.
ELBRIDGE DURBROW.

[SEAL.] ALFRED A. ENQUIST,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed December 4, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

72 In the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

THE SECRETARY OF THE TREASURY, Petitioner and Appellee,
vs.
THE ANGLO-CALIFORNIAN BANK (LIMITED), Respondent and Appellant. } No. 12070.

Clerk's Certificate to Transcript.

In the matter of the petition of the Secretary of the Treasury for review of a decision of the board of United States general appraisers relative to certain twenty steel rails.

I, W. J. Costigan, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing seventy (70) pages, numbered from 1 to 70 inclusive, to be a full, true and cor-

rect copy of the record and proceedings in the above and therein entitled matter, and that the same together constitute the transcript of the record herein, upon appeal to the United States circuit court of appeals, for the ninth circuit.

I further certify that the cost of the foregoing transcript of record is $42.70, and that the said amount was paid by the Anglo-Californian Bank, Limited, appellant.

73 In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court this 2d day of January, A. D. 1896.

[SEAL.]

W. J. COSTIGAN,
Clerk United States Circuit Court,
Northern District of California.

THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States of America, Ninth Circuit, in and for the Northern District of California.

In the Matter of THE SECRETARY OF THE TREASURY, Petitioner and Appellee, *vs.* THE ANGLO-CALIFORNIAN BANK, LIMITED, Respondent and Appellant.	Citation. No. 12070.

Citation.

To John G. Carlisle, Secretary of the Treasury, Greeting:

Whereas, The Anglo-Californian Bank, Limited, respondent and appellant above named, has lately appealed to the circuit court of appeals of the United States, ninth circuit, from the judgment and decision lately rendered in the circuit court of the United States for the northern district of *the United States*, made in favor of you, Secretary of Treasury, and has filed the security required by law, you are therefore hereby cited and admonished to be and appear before the said circuit court of appeals at the city and county

74 of San Francisco, State of California, on the 3d day of January, A. D. 1896, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city and county of San Francisco in the said ninth circuit this 4th day of December in the year of our Lord one thousand eight hundred and ninety-five.

JOSEPH McKENNA,
Judge of the Circuit Court of the United States in and for the Northern District of California.

(Endorsed:) No. 12070. Citation. Due service of within citation admitted this 4th day of December, 1895. H. S. Foote, U. S. att'y and attorney for appellee. Filed December 4, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

(Endorsed:) No. 273. United States circuit court of appeals for

the ninth circuit. The Anglo-Californian Bank, Limited, appellant, *vs.* The Secretary of the Treasury, petitioner, etc., appellee. In the matter of the petition of the Secretary of the Treasury for review of a decision of the board of United States general appraisers relating to certain twenty steel rails. Transcript of appeal. From the circuit court of the United States of America, for the ninth judicial circuit, in and for the northern district of California. Filed January 2, 1896. F. D. Monckton, clerk.

75 At a stated term, to wit, the October term, A. D. 1895, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Friday, the fourteenth day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
vs.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

Ordered, appeal argued by Charles A. Garter, Esq., counsel for the appellant, and Samuel Knight, Esq., assistant United States attorney, and submitted to the court for its consideration and decision, the appellant being allowed ten days to file a reply brief.

76 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
vs.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

In the matter of the petition and application of the Secretary of the Treasury for a review, under an act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues," of the questions of law and fact involved in a decision of the board of general appraisers on duty at the port of New York in the matter of the classification of certain (T) steel rails, merchandise imported by the Bank of California of San Francisco, California, into the port of San Francisco, the subsequent liquidation of duties whereon was protested by the Anglo-Californian Bank, Limited, at the same place.

Appeal from the circuit court of the United States for the northern district of California.

The board of general appraisers sustained the protest of the Anglo-Californian bank against the decision of the collector of customs at San Francisco. The circuit court reversed the decision of

the appraisers. The material facts upon which the matter in issue was tried are stated in the opinion of the appraisers and of the circuit court to be as follows: "The Bank of California, at various times between March 2 and June 24, 1887, imported into the port of San Francisco certain (T) steel rails, aggregating 5,678 tons. These rails remained in general order unclaimed until February 27, 1888, when warehouse entries thereof were made and bonds given by the Bank of California as importer and consignee. Said warehouse entries were liquidated, under the act of March 3, 1883, at $17 per ton, and at the expiration of one year from the date of the importation
the additional duty of 10 per cent. prescribed by section 2970,
77 Revised Statutes, was charged upon the bonds against the
merchandise. Between September 21, 1888, and December 6, 1889, four withdrawals for consumption were made and the amount of duties charged thereon was paid. When the bonded period of three years was about to expire the Oregon Pacific Railroad Company, for whose account the steel rails in question had been imported, represented to the Treasury Department that serious casualties had occurred to its roads by storms and floods, and requested a postponement of the sale of merchandise required under section 2971, Revised Statutes; whereupon the Secretary of the Treasury authorized a postponement of the sale for three months without giving due notice to or having the consent of the principal or sureties on the warehouse bonds. Similar postponements have been allowed for periods of six months up to the present date, the Bank of California uniting in two instances in the application for delay. A postponement of the sale of the merchandise allowed by the Secretary of the Treasury September 16, 1893, was conditioned upon the consent of the sureties on the bond. The final postponement was authorized by the Secretary of the Treasury March 25, 1895, pending decision regarding the legal status of the goods by the board of general appraisers. Under date of June 30, 1890, more than three years after the date of importation, the Secretary of the Treasury authorized the collector at San Francisco to permit withdrawals for consumption of the steel rails in question from time to time in such quantities as might be desired. On October 21, 1890, the Treasury Department decided that withdrawals might be made under the act of 1890 by the importers at the rates of duty, regular and additional, prescribed by the act of 1883. Notwithstanding this decision 3,306 tons of steel rails were withdrawn for consumption, and in addition to 10
per cent., as prescribed by section 2970, Revised Statutes,
78 duties were paid thereon and accepted by the collector at $13.44 per ton, the rate prescribed therefor in act of October 1, 1890. All charges and expenses, including storage charges, have been paid. The importers recently offered to withdraw for consumption the remainder of the merchandise in bonded warehouse at the rate prescribed in paragraph 117 of the act of August 1, 1894. Permission to make such withdrawals has not been granted by the Secretary of the Treasury, but in lieu thereof authority has been given the collector to permit withdrawal entry to be made by

the importers of a small portion of the merchandise at the rates prescribed in the act of March 3, 1883, in order that a test case for judicial decision might be made. In accordance with the authority thus granted, entry for consumption of twenty of the steel rails in question (weighing about 5 tons) was made by the importers, and duty was assessed thereon by the collector at $17 per ton and 10 per cent. additional under the act of March 3, 1883, the act in force at the time the merchandise was imported. Against this action the importers protested, claiming that the merchandise in question, having been withdrawn for consumption after August, 1894, was properly dutiable at seven-twentieths of 1 cent per pound, in accordance with the provisions of section 1 and paragraph 117 of the present act."

Upon these facts the questions presented involve a construction of certain sections of the Revised Statutes of the United States; of the act of June 10, 1890, to simplify the laws in relation to the collection of the revenue (26 Stat., 131, 142), known as the administrative act; of the act of October 1, 1890, to reduce the revenue and equalize duties on imports, and for other purposes (26 Stat., 567, 625), known as the McKinley act, and of the act of August 28, 1894, to reduce taxation, to provide revenue for the Govern-
79 ment, and for other purposes (28 Stat., 509, 570), known as the Wilson act. The sections of the statutes read as follows:

Revised Statutes.

"SEC. 2970. Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

"SEC. 2971. All merchandise which may be deposited in public store or bonded warehouse may be withdrawn by the owner for exportation to foreign countries; or may be transshipped to any port of the Pacific or western coast of the United States at any time before the expiration of three years from the date of original importation; such goods on arrival at a Pacific or western port to be subject to the same rules and regulations as if originally imported there. Any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Government, and sold under such regulations as the Secretary of the Treasury may prescribe, and the proceeds paid into the Treasury. In computing this period of three years, if such exportation or transshipment of any merchandise shall, either for the whole or any part of the term of three years, have been prevented by reason of any order of the President, the time during which such exportation or

transshipment of such merchandise shall have been so prevented shall be excluded from the computation. Merchandise with-
80 drawn for exportation shall be subject only to the payment of such storage and charges as may be due thereon."

"SEC. 2972. The Secretary of the Treasury, in case of any sale of any merchandise remaining in public store or bonded warehouse beyond three years, may pay to the owner, consignee, or agent of such merchandise, the proceeds thereof, after deducting duties, charges, and expenses in conformity with the provision relating to the sale of merchandise remaining in a warehouse for more than one year."

"SEC. 2973. If any merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, except as hereinbefore provided, then such merchandise shall be appraised by the appraisers, if there be any at such port * * * and sold by the collector at public auction, on due public notice thereof being first given, in the manner and for the time to be prescribed by a general regulation of the Treasury Department. At such public sale, distinct printed catalogues descriptive of such merchandise, with the appraised value affixed thereto, shall be distributed among the persons present at such sale. A reasonable opportunity shall be given before such sale, to persons desirous of purchasing, to inspect the quality of such merchandise. The proceeds of such sales, after deducting the usual rate of storage at the port in question, with all other charges and expenses, including duties, shall be paid over to the owner, importer, consignee, or agent and proper receipts taken for the same."

Administrative Act.

"SEC. 20. Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: Provided, that nothing herein shall
81 affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

Section 29, after enumerating several sections of the Revised Statutes (sections 2970, 2971, 2972, and 2973 not being mentioned) and repealing them in direct terms, reads as follows: "And all other acts and parts of acts inconsistent with the provisions of this act, are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made." * * *

McKinley Act.

The enacting clause reads as follows: "That on and after the sixth day of October, eighteen hundred and ninety, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:

"Schedule C, paragraph 141. Railway bars, made of iron or steel, and railway bars made in part of steel, T rails, and punched iron or steel flat rails, six-tenths of one cent per pound."

Sections 50, 54, and 55 of this act read as follows:

"SEC. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond
82 for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported respectively after that day: Provided, that any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: Provided further, that when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

"SEC. 54. That section twenty of the act entitled 'An act to simplify the laws in relation to the collection of revenues;' approved June 10th, eighteen hundred and ninety, is hereby amended to read as follows: 'Sec. 20. That any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: Provided, that nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.'"

"SEC. 55. That all laws and parts of laws inconsistent with this act are hereby repealed: Provided, however, that the repeal of existing laws, or modifications thereof, embraced in this act shall not affect any act done or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the
83 said repeal or modifications, but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modification had not been made."

Wilson Act.

The enacting clause is, "That on and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this act, there shall be levied, collected and paid upon all articles imported from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed, namely:

"Schedule C, paragraph 117.—Railway bars, made of iron or steel, and railway bars made in part of steel, T rails, and punched iron or steel flat rails seven-twentieths of one cent per pound." (Which computed upon the basis of 2,240 pounds to the ton would be $7.84 per ton.)

SEC. 72. "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made." * * *

Section 10 of the act of March 3, 1883 (22 Stat., 525), to which reference will be made, reads as follows:

"That all imported goods, wares, and merchandise which may be in the public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in
84 this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day; and all goods, wares, and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, shall be entitled to a refund of the difference between the amount of duties paid and the amount of duties said goods, wares, and merchandise would be subject to if the same were imported respectively after that date."

Chas. A. Garter, Jesse W. Lilienthal, and J. F. Evans, for appellant; H. S. Foote, U. S. attorney, and Samuel Knight, assistant U. S. attorney, for appellee.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

The contention of appellant, upon the foregoing state of facts and the various provisions of the statutes relating thereto, is to the effect that when the McKinley act went into operation the specific rate of duty upon steel rails was changed from $17 per ton to $13.44; that this rate was again changed by the Wilson act to $7.84; that section 2970 of the Revised Statutes has been repealed and is, therefore, inapplicable to the merchandise in controversy in this proceeding;

that the words "shall be regarded as abandoned to the Government," used in section 2971, were repealed by the later sections of the Revised Statutes, and have been so treated by the regulations and practice of the Treasury Department.

The contention of the appellee is that at the expiration of three years from the date of the original importation the merchandise in question became abandoned to the United States and was
85 subject to sale as such to satisfy the duties and charges thereon then in force, to wit, the duty of $17 a ton under paragragh 147 of the tariff act of March 3, 1883, and ten per cent. additional thereon, with warehouse charges, under section 2970 of the Revised Statutes; that this right to sell the merchandise and to deduct from the proceeds thereof the duties and charges as above mentioned was a right accrued at such time to the United States and a liability incurred by said merchandise and the importer thereof, within the meaning of section 29 of the administrative act of June 10, 1890; section 55 of the McKinley act of October 1, 1890, and section 72 of the Wilson act of August 28, 1894; that section 2971 of the Revised Statutes was not repealed nor in any manner modified by the administrative act, nor by the McKinley act, nor by the Wilson act, but ever has been since its enactment in full force and effect, save as modified by section 2972, and that it therefore necessarily follows that the duties and charges properly assessed against the steel rails and collected from the proceeds of the sale thereof or from the importer thereof by the collector of customs are those in force at the time of their abandonment.

Which contention is correct?

The questions involved in this case have been argued with marked ability upon both sides. The authorities bearing upon the questions have been collected and discussed at length. The various acts of Congress have been thoroughly reviewed and our attention has been called to the entire system of tariff legislation.

The contention of appellant is sustained by the decision of the Court of Claims in Abbott *v.* United States, 20 Court of Claims, 280. The contention of appellee is sustained by the views expressed
86 by Attorney General Brewster (17 Att'y Gen. Op., 650), and Attorney General Olney, January 17, 1895. Owing to these conflicting opinions the contest in the present case is presented with the evident purpose of having the questions authoritatively settled.

In the outset it will be conceded that revenue statutes are enacted under the general power of the Government to impose a tax; that in order to sustain the tax in any given case it must affirmatively appear that the power to impose it comes within the letter and spirit of the law authorizing it; that if there are any doubts upon the question the construction should be in favor of the importer. Mr. Justice Story, in Adams *v.* Bancroft, 3 Sum., 384; 1 Fed. Cases, No. 44, p. 84, said "that laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations, for every duty imposes a burden on the public at large, and is construed strictly, and must be made out in a clear and determinate manner

from the language of the statute." The same rule has been expressed by the Supreme Court. Hartranft *v.* Wiegmann, 121 U. S., 609, 616, and authorities there cited. The same learned justice in the earlier case of United States *v.* Breed, 1 Sum., 159; 24 Fed. Cases, p. 1222, laid down the rule as to the proper construction to be given to such acts as follows: "Revenue and duty acts are not in the sense of the law penal acts, and are not, therefore, to be construed strictly; nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial, and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms, and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them."

Such laws are more remedial than penal in their nature.
87 They are intended to prevent fraud, to suppress public wrong, and to promote the public good, and should always be so construed as to effectually carry out the purposes and objects which they were intended to accomplish. Taylor *v.* United States, 3 How., 197; Cliquot's Champagne, 3 Wall., 115; United States *v.* Hodson, 10 Wall, 395; Smythe *v.* Fiske, 23 Wall., 374, 380.

The steel rails in question were imported in 1887 and entered for warehousing February 27, 1888, and the duties liquidated under the act of 1883. At that time the rights and liabilities of the importers were clear and plain. They had the right to withdraw the rails within one year by paying the duties then existing, viz., $17 per ton, or they might, after the expiration of one year and within three years, withdraw the rails upon paying the duty of $17 per ton and 10 per cent. additional duty. (Rev. Stat., 2970.)

Upon this point there can be no controversy; but the rails in question were not withdrawn until after the expiration of the three years, and hence, under the terms of section 2971, were to be "regarded as abandoned to the Government;" but this right of the Government was not enforced because the Oregon Pacific railroad, for whose account the rails were imported, requested a postponement of the sale for three months on account of serious casualties that had occurred to its railroad. Other postponements were for like reasons made for periods of six months, and in the meantime the tariff acts, designated as the McKinley act and the Wilson act, were passed.

Admitting at the threshold of the discussion that the word "abandonment," when first used in the act of August 5, 1861 (12 Stat., p. 294, sec. 5), and repeated in the act of July 14, 1862 (12 Stat., p. 560, sec. 21), during the existence of war, was then used in the broad sense of divesting the importer or
88 owner of any title or interest in the goods, it does not necessarily follow that the same interpretation is to be given to it in the provisions of section 2971. The fact is that by the act of July 28, 1886 (14 Stat., p. 330, sec. 10), the provisions of the act of August 6, 1846, were re-enacted, so that thereafter the law provided that after the sale of the merchandise the excess, after deducting storage, expenses, and duties, etc., should be paid to the owner. The

various provisions of the existing laws were thereafter incorporated into the provisions of the Revised Statutes. It therefore follows that the word abandonment, as used in section 2971 in connection with the provisions contained in section 2972, is not to be construed as an absolute abandonment of the goods so as to vest the title thereof in the Government; but the word is used in the sense of vesting absolute authority and power in the Government when the goods have remained in the warehouse for a period of more than three years to sell and dispose of the same for the purpose of collecting the duties, charges, and expenses thereon. This, as we shall have occasion hereafter to state, might be accomplished by a regulation of the department allowing the goods to be withdrawn by the owner upon payment of such duties, etc.

Without repeating the respective arguments of counsel in their review of the tariff legislation, the policy of the Government in the collection of revenue duties on imported goods, and the rights of the importers to withdraw from bonded warehouses imported merchandise therein stored, we are of opinion that, after an extended examination thereof, it may safely be said that throughout the entire legislation of this country upon the subject the intent of Congress to limit the right of the importer to withdraw his goods within a certain time and to impose
89 condition for his failure so to do is made manifest. If there were no provisions in the statute for the sale of the goods by the Government, it will readily be seen, as was said by Brown, J., in United States *v.* Visser, 10 Fed., 642, 649, that "the time for the payment of duties on all warehouse goods would be practically considerably enlarged, since payment of duties could always be safely deferred until the Government was ready to effect a sale. To avoid this practical extension of the period for payment of duties and to secure prompt payment within the time intended to be limited by the warehouse acts, some provision of this kind was necessary. Moreover, the handling of the vast amount of warehoused goods, the orderly collection of the duties upon them through the proper subordinate officers, and the necessity of a transfer of the goods to different hands for the purpose of a Government sale—in other words, the conveniences of the public business—also required that a period be fixed when the importer's right to pay the duties and to control the goods should cease and when the Government might proceed to sell without inconvenience and without question. The various acts passed since the adoption of the warehouse system show, I think, that the purpose of the statute in question was not only for convenience in the transaction of the public business, but especially, also, to secure the prompt payment of duties within the prescribed period."

The argument of appellant that the action of the Secretary of the Treasury in authorizing the various postponements of the sale of the rails had the effect to nullify the provisions of section 2971 with reference to the abandonment of merchandise remaining in the bonded warehouse beyond the period of three years ought not to be sustained. It is true that under the revenue laws the Secretary of

the Treasury, in the collection of the revenues, is invested
90 with much discretion in the exercise of his administrative functions. He has the power to prescribe rules and regulations as to the modes of collection, etc., but he cannot, in the exercise of this power, alter or amend the provisions of the revenue laws. "All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted." Morrill *v.* Jones, 106 U. S., 467; Campbell *v.* United States, 107 U. S., 407, 410.

The regulations as made by the Secretary of the Treasury cannot, of course, control the courts in the construction of the revenue laws when their meaning is plain, yet if there has been a long acquiescence in such regulations and the rights of parties have been adjusted in accordance therewith the courts ought not to take a different view "without the most cogent and persuasive reasons." Brown *v.* United States, 113 U. S., 571; United States *v.* Hill, 120 U. S., 170, 182; Robertson *v.* Downing, 127 U. S., 607, 613.

The action of the Secretary of the Treasury in postponing the sale of the merchandise after the expiration of three years did not have the effect of giving the importers any new privilege or right or release them from any liability which existed by law.

The regulation of the Treasury Department of February 27, 1884, that "within the three years during which goods remaining in bonded warehouse may be withdrawn collectors of customs will notify the parties concerned of the date on which the period limited by law will expire; after such date and at any time before the goods are listed for sale the collector may allow a withdrawal entry for consumption, to be made on payment of all charges and expenses, and the duties, regular and additional, which may have accrued," is consistent with the provisions of sections 2191 and 2192 and does
not in any manner change or affect the rate of duty and the
91 charges and expenses to which the merchandise had become liable. It is in effect the same as if a sale of the goods had been provided for. Attorney General Brewster, in reply to the third question of the Secretary of the Treasury, as to "whether, under section 2971, Revised Statutes, goods are to be sold at the expiration of three years from the date of importation, notwithstanding the fact that duties may have been already paid thereon," said: "While I am of opinion that your third question should be answered in the affirmative, and so answer it, I deem it proper to add that I perceive no legal objection to the existing practice of your department respecting the disposition of goods which have remained in bonded warehouse beyond three years. The objects and requirements of the provisions of section 2971, last above adverted to, are in my judgment sufficiently met by that practice, whereby, in lieu of a former sale of goods, the owner, consignee, or agent is permitted to pay the duties, charges, etc., that have accrued thereon and take them away. In case of a sale the owner, consignee, or agent of the merchandise would (under section 2972) become entitled to receive the proceeds after deducting therefrom the duties, charges, and expenses. The practice referred to accomplishes the same end and is

indeed a virtual sale of the goods under the power given the Secretary of the Treasury by the statute."

The act of the Secretary of the Treasury in allowing the withdrawal of the rails in this case is not inconsistent with the provisions of section 2971 with reference to the abandonment of the merchandise. The Secretary, in his letter to the collector of customs allowing the withdrawal, expressly stated that a reference to the decision of the department for a long series of years shows that it has uniformly held that the duties found due on the warehouse bond at the date of its expiration became a debt collectable
92 from the proceeds of a sale of the goods or from the sureties on the bond, and that subsequent changes of tariff can neither increase nor decrease the amount of such debt. The letter further stated that the department was not disposed to inflict unnecessary hardship upon the importers by a summary closure of the matter, and, while denying the right of the importers to withdraw the goods unless the duty assessed under the act of March 3, 1883, was paid, permitted them to withdraw a small portion at that rate, and the object of this is stated as follows: "It may be that duties will be so paid under protest in order that the exaction of duty may be reviewed by the board of general appraisers. Should this prove to be the case, you are further authorized to delay the sale of the remaining property until a decision has been reached."

Surely the importers cannot claim that they were released from any existing liability by reason of this extended favor. The withdrawal of a small portion of the goods was allowed in order to test, not to create, the liability of the importers and the rights of the Government in the premises.

The case of Abbott & Co. *v.* United States, 20 Court of Claims, 280, decided April 27, 1885, is cited in support of, and is conceded to be an authority in favor of, the position contended for by appellant. In that case the claimants were, on July 1, 1883, the owners of 66,575 pounds of wool lying in the United States bonded warehouse at Boston. The wool was imported from England March 8, 1880, and placed in the warehouse, where it remained until August 31, 1883. It was then removed by the claimants. The duties were paid March 7, 1881. The claimants made a demand upon the collector of the port for $665.75, a sum equal to a difference between the duties that had been levied and paid and the duty to which the wool was subject under the tariff act of March 3, 1883, and the
93 court held that the claimants were entitled to the refund. The court, after quoting section 10 of the act of 1883, said: "The language of this section, so far as it relates to goods upon which the duties had been paid, is very general. Taken by itself, it fully sustains the claimants' demand, for their goods were in bonded warehouse when the act went into effect and the duties had been paid. The defendants, however, contend that the claimants can derive no benefit from this section, because their goods, having been in the bonded warehouse for more than three years, were abandoned to the Government under section 2971, Revised Statutes. This section provides that 'any goods remaining in public store or bonded

warehouse beyond three years shall be regarded as abandoned to the Government and sold under such regulations as the Secretary of the Treasury may prescribe.' Standing by itself, this section might support the defendants' position. It implies that the title of the original owners, by lapse of time and operation of law, has become divested and the Government has succeeded to the ownership. The original act, July 14, 1862 (12 Stat. L., p. 560), from which this section is taken, was based upon that theory, and so it provided that the proceeds of sale should be paid into the Treasury. The character of this provision and purpose of the Government have been entirely changed by the act, July 28, 1866 (14 Stat. L., p. 330), now section 2972, which provides that 'the Secretary of the Treasury may pay to the owner, consignee, or agent of such merchandise the proceeds thereof after deducting duties, charges, and expenses.' Since this enactment the goods are no longer to be regarded as abandoned by the owner to the Government. The ownership continues without change, but after the sale attaches to the net proceeds instead of the goods. The two sections construed together provide a mode for the collection of duties and charges and the clearance
94 of the warehouses. When the goods have remained in bond more than three years the Government acquires a right to sell them for the purpose named, but cannot pocket the proceeds. Hence the practice has arisen in the Treasury Department to allow the owner, at any time before the goods are advertised for sale, to remove the same upon the payment of duties and charges." After quoting with approval the views of Attorney General Brewster as to the practice of the department allowing the owner to withdraw the goods upon the payment of duties — further said: "Apparently Congress intended that all goods remaining in the bonded warehouse July 1, 1883, and which, according to the construction and practice of the department under sections 2971 and 2972, might be withdrawn by the consignee upon payment of duties and charges, should go upon the market with no heavier burdens than were to be imposed, under the new tariff, upon later importations." In so far as this opinion declares that the provisions of section 2971 *has* been changed by section 2972 so as to allow the importer to remove the goods after they have been in the bonded warehouse beyond the period of three years, "upon the payment of duties and charges," it is not opposed to the views we have expressed. The claimants in the present case were allowed to withdraw the goods in question upon payment of the duties and charges demanded by the collector. The question is, What amount of duty were the goods subject to?

The court in the Abbott case seemed to be of opinion that because of the provisions in section 2972 and the practice of the department in allowing the goods to be withdrawn it was the intention of Congress that the goods "should go upon the market with no heavier burdens than were to be imposed under the new tariff upon later importations." In this respect we decline to accept the con-
95 clusions reached by the Court of Claims. The opinion is entitled to and has received respectful consideration, but it is

not of controlling authority and ought not to be followed unless its reasoning and conclusion are deemed to be correct.

The case of *In re* Schmid, 54 Fed., 145, cited and relied upon by appellant, is different in its facts from the case at bar in this, that the goods in question in that case had not been in bond for a period of three years, and hence did not come within the provisions of section 2971.

Is section 2971 repealed by the subsequent tariff acts?

We have already quoted at length in the statement of facts the various sections and provisions of the laws which are relied upon by appellant to sustain his contention. They need not be again repeated in full. Section 29 of the administrative act repealed in direct terms several sections of the Revised Statutes, but among them section 2971 is not mentioned. It was not in direct terms repealed. The same section of the act also repealed "all other acts and parts of acts inconsistent" with its provisions, with a saving clause that such repeal or modification of the existing laws "shall not affect any act done or any right accruing or accrued, * * * but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made."

Section 55 of the McKinley act of October 1, 1890, and section 72 of the Wilson act of August 28, 1894, contain the same provisions.

Conceding that section 2970 has been repealed, the question still remains, Is section 2971 inconsistent with or repugnant to any of the provisions contained in the acts above mentioned?

It must be conceded that in order to constitute a repeal of the law upon such grounds there must be a positive repugnancy
96 between the old laws and the new one. This principle is elementary. In no line of cases has this rule been adhered to with greater strictness than in the interpretation of laws enacted for the collection of the revenues.

In Wood *v.* United States, 16 Pet., 342, 362, the question was presented to the court whether the 66th section of the act of 1799 had been repealed or whether it remained in full force. That section of the act, like the one under consideration here, had not been expressly or by direct terms repealed, and the court said: "The question then arises whether the 66th section of the act of 1799, c. 128, has been repealed or whether it remains in full force. That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary; but there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy; and it may be added that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numer-

ous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud should be deemed repealed merely because in subsequent laws other powers and authorities are given to the custom-house officers and other modes of proceeding are allowed to be had by them before the goods have passed from their custody in order to ascertain whether there has been any fraud attempted upon the Government. The
97 more natural, if not the necessary, inference in all such cases is that the legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated and were designed to abrogate the former." See also Aldridge *v.* Williams, 3 How., 1, 25; The Distilled Spirits, 11 Wall., 356, 365; Fabri *v.* Murphy, 95 U. S., 191, 196.

In Fabri *v.* Murphy the question was whether the merchandise was subject to the additional duty of ten per cent. imposed by the act of March 14, 1866 (14 Stat., 8). The goods were imported in November, 1869, and were stored in the bonded warehouse until March 20, 1871, when they were withdrawn for consumption. The court held that the goods were subject to the additional duty of ten per cent. imposed by the act of 1866. In discussing certain acts relating to the revenue the court said: "Acts of Congress of the kind are often very complex in their provisions in order to enable those charged with their execution to protect the Treasury against the constant attempts of importers to evade the payment of new duties or increased taxation. New regulations often become necessary to enable the officers of the custom to defeat such designs, and the rule is that in such cases there ought to be a manifest and irreconcilable repugnancy to warrant the conclusion that the old law is abrogated or that the new law was intended to supersede the antecedent provision."

In the light of these cardinal rules of construction and of the history, policy, and intention of the revenue laws, as hereinbefore discussed, we are of opinion that the provisions of section 2971
98 are not inconsistent with the various sections of the subsequent tariff acts hereinbefore referred to.

Attorney General Brewster, February 7, 1884, in reply to the question of the Secretary whether section 10 of the act of 1883 is necessarily limited to goods which had not been in bonded warehouses more than three years at the date said act went into operation, among other things, said: "That the first clause of this section, which deals with imports whereon the duties have not been paid, applies only to such merchandise remaining in the public stores or bonded warehouses on the day the act takes effect as may then lawfully be entered for consumption is indicated by the words 'upon entry thereof for consumption' used therein. These words plainly show that the benefits of the provision were meant for merchandise

in bond, which, at the time mentioned, the importer is entitled thus to enter, and for none other. * * * Thus, by the then and still existing law, goods in bond can be entered for consumption and withdrawn at any time during the period of three years from the date of original importation. Upon the expiration of this period, however, the privilege so to enter such goods ceases, and (by section 2971, Revised Statutes) they are to be 'regarded as abandoned to the Government and sold under such regulations as the Secretary of the Treasury may prescribe,' etc. It follows that merchandise whereon the duties have not paid, which had been in the public stores or bonded warehouses more than three years on the day the act of 1883 took effect, does not come within the operation of section 10 of that act. * * * Under section 2977, Revised Statutes, merchandise upon which duties have been paid may thereafter remain in bonded warehouse in custody of the customs officers at the expense and risk of the owners; but the period during which it may thus remain subject to withdrawal by him is limited, for unless withdrawn for consumption or exportation within three years
99 from the date of original importation it becomes liable to be sold as abandoned to the Government (sec. 2971, Rev. Stat.). * * * I am thus led to the conclusion that the whole of the section is inapplicable to merchandise which on the day the act of 1883 took effect had remained in bonded warehouse more than three years from the date of original importation, and were then, in contemplation of law, abandoned to the Government. In direct answer to your first question I accordingly reply that, in my opinion, section 10 of the tariff act of March 3, 1883, extends only to goods which had not been in bonded warehouse more than three years at the date that act went into operation. * * * The provision in section 2971 * * * has, I think, a double purpose. First, to enforce the collection of duties, charges, etc., upon the goods, and, second, to relieve their customs service from the care and custody thereof. * * * Yet, as already observed, the privilege thereby conferred of letting the goods remain in warehouse in custody of the custom officers after payment of the duties thereon is subject to the limitation of three years from the date of original importation under the operation of the above-mentioned provision in section 2971. At the end of that period they are to be regarded as abandoned to the Government and sold."

If section 2971 is consistent with the provisions of section 10 of the act of 1883, how can it consistently be said that it is repugnant to the section of the McKinley or Wilson acts which we have cited. The preamble in the tariff acts must be read in the light of what is contained in other parts of the laws, especially of the provisions of section 29 of the administrative act, section 55 of the McKinley act, and section 72 of the Wilson act, to the effect that the repeal of existing laws or modifications shall not affect any act done "or any right accruing or accrued," etc. The merchan-
100 dise in question, having remained in the bonded warehouse for a period of more than three years on the 24th of June, 1890, became, under the laws then existing and in full force,

subject to the duty provided in the tariff act of March 3, 1883, and ten per cent. additional thereon, with warehouse charges as prescribed by law. This was a right that had accrued to the Government prior to the passage of the McKinley or Wilson tariff acts. In United States *v.* Burr, 159 U. S., 78, the court held that goods arriving at the port of New York August 7, 1894, entered at the custom-house, and duties paid August 8, 1894, and the entry liquidated as entered at the custom-house August 28, 1894, on which day the tariff act of August, 1894, became a law, were subject to duty under the act of October 1, 1890, and not to duty under the act of August 28, 1894. The court, in the course of its opinion, after quoting in full section 72 of the Wilson act and the provisions of section 54 of the McKinley act, said: "This merchandise was entered for consumption and delivered after August 1 and before August 28, 1894, when the act in question became a law. It was subject then to the rates of duty imposed by the law in force at that time, namely, the act of October 1, 1890, and the duties were properly assessed by the collector under that law, unless some provision to the contrary is to be found in the act of August 28, 1894." After quoting the preamble in the first section of the act of 1894, the court continues: "The contention is that, the language of that section being free from all obscurity and ambiguity, there is no room for construction, and that the court is imperatively required to conclude that it was the intention of Congress that the act should have a retrospective operation as of August 1, 1894, although it did not become a law until after that date. It is conceded that the general rule is, as stated in United States *v.* Heth, 3 Cranch, 398, 413, that 'words in a statute
101 ought not to have a retrospective application unless they are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied,' and that the usual course in tariff legislation has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix a future date at which the statutes are to become operative. The question is not one of construction, but of intention as to the operative effect of this act because of the existence of the particular date in section 1. In view of the general rule and the admitted policy in respect of such laws, is there anything on the face of the act which raises such a doubt in the matter as justifies the court in considering whether the language used in that particular section must be literally applied in the case before it? And upon the threshold we are met with the fact that the act of October 1, 1890, was not repealed in terms until August 28, 1894, and that the repealing section of the latter act kept in force every right and liability of the Government or of any person which had been incurred or accrued prior to the passage thereof, and thereby every such right or liability was excepted out of the effect sought to be given to the first section. The right of the Government to duties under the tariff law which existed between August 1 and August 28 was a right accruing prior to the passage of the act of 1894 (that is, the date when the bill became a law), and the obliga-

tion of the importers between August 1 and August 28 to pay the duties on their entries under existing tariff law was a liability under that law arising prior to the passage of the act of 1894, and if Congress intended that section 1 should relate back to August 1, still the intention is quite as apparent that the act of October, 1890, should remain in full force and effect until the passage of the new act on August 28, and that
102 all acts done, rights accrued, and liabilities incurred under the earlier act prior to the repeal should be saved from the effect thereof, as to all parties interested, the United States included. The duties under consideration were paid August 8, and the merchandise delivered on August 11, but it was not until August 28 that the fact was stamped on the entry that the goods were liquidated as entered. There was no change in the classification and no additional duty was demanded or collected, and the payment made at the time of entering the merchandise for consumption was the payment of duties. Barney *v.* Rickard, 157 U. S., 352. The original assessment of duty was right, and the final liquidation was the same, and there was no specific provision in the act of 1894 requiring a liquidation at the rates under that act. How, then, can it be held that the act of October 1, 1890, was intended to be repealed by retroaction? Moreover, in arriving at the true intention of Congress we cannot treat section 1 as if it constituted the entire act, but must deduce the intention from a view of the whole statute and from the material parts of it. * * * Again, a higher rate of duty was imposed on many articles by the act of 1894 than under the prior act, and a lower rate of duty on others, while some that were free were made dutiable, as, for instance, the article of sugar. Must duties paid between August 1 and August 28 be refunded where the rate was lowered and assessed where the rate was raised or a duty imposed where none existed? Clearly not. These considerations lead to the conclusion that the act ought not to be construed to operate retrospectively contrary to the general rule, and so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary. * * * And as the act of October 1, 1890, was not repealed by the act of
103 August, 1894, until the latter act became a law, when inconsistent laws were declared thereby repealed, we think it cannot be doubted that Congress intended the rates of duty prescribed by the act of 1894 to be levied on the first day of August if the bill should then be a law, and if not, then as soon after that date as it should become a law. On the first day of August the duties prescribed by the first section of the act of 1894 could not be lawfully levied, and, so far as the importations in this case are concerned and others similarly situated, the law required the exaction of the duties prescribed by the act of 1890. As to such importations the first section of the act of 1894 could not be literally carried out, unless by holding it to operate as a retroactive repeal, notwithstanding the saving clause, and this we consider altogether inadmissible. The language of section one was that on and after the first of August

there shall be levied, and of the second section that on and after the first day of August certain enumerated articles when imported shall be exempt from duty. In our judgment, the word 'shall' spoke for the future and was not intended to apply to transactions completed when the act became a law."

Appellant relies upon the words "or withdrawn for consumption," as found in the preamble of the Wilson act, to sustain the position that the rate of duties therein prescribed apply not only to merchandise thereafter imported from foreign countries, but also to merchandise that had remained in the bonded warehouse for a period of more than three years which should thereafter be "withdrawn for consumption." It may be admitted that such a construction could and should be given to the language of the preamble if its interpretation was to be drawn from that section alone; but it is the duty of the court to examine the entire act, or at least the
104 provisions which have any special bearing upon the question, and also to examine the provisions of other acts which are to be construed in *pari materia* therewith. The entire revenue laws in force must not be overlooked. All acts not repealed must be taken into consideration and harmonized, if possible, so as to make a consistent whole. To give to the section in question the construction which appellant claims for it would, as we have already shown, be inconsistent with the history and general policy of the tariff legislation of this country and repugnant to various provisions of the existing revenue laws. To construe the words "withdrawn for consumption" as intended to apply to the provisions of the previous revenue acts allowing goods to be "withdrawn for consumption" within three years makes it consistent, and such, we believe, was the intention of Congress.

Attorney General Olney in a letter dated January 17, 1895, to the Secretary of the Treasury with reference to rates of duty chargeable on certain goods which were originally imported while the provisions of the McKinley tariff act of 1890 were still in force, but remained in the custody of the Government until after the passage of the Wilson tariff act of 1894, expressed views which we believe to be correct and directly applicable here. He said that by the express language of section 1 of the act of 1894 "the new rates apply not to all warehoused goods, as by section 50 of the act of 1890, but only to 'articles (thereafter) imported from foreign countries or withdrawn for consumption.' The latter clause should be construed with the prior legislation above quoted, so as to constitute a harmonious whole. In my opinion, therefore, goods imported and entered for warehouse prior to the act of 1894 and not withdrawn for
105 consumption within three years from the date of original importation are unaffected by the new rates of duty, and the 'duties' mentioned in section 2872 of the Revised Statutes are the duties to which they were previously subject, whatever be the construction to be put upon this section in other respects. My opinion applies not only to goods imported within three years before the act of 1894 took effect, but to all goods theretofore imported and then subject to the tariff rates of 1890."

For the reasons herein given we are of opinion that the contention of the appellee is correct.

The judgment of the circuit court is affirmed with costs.

(Endorsed:) Opinion. Filed Oct. 19, 1896. F. D. Monckton, clerk.

106 United States Circuit Court of Appeals for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
vs.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

Appeal from the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

(Endorsed:) Decree. Filed Oct. 19, 1896. F. D. Monckton, clerk.

107 United States Circuit Court of Appeals for the Ninth Circuit.

THE ANGLO-CALIFORNIAN BANK, LIMITED, Appellant,
v.
THE SECRETARY OF THE TREASURY, Petitioner, etc., Appellee. } No. 273.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and six pages, numbered from one to one hundred and six, both inclusive, to be a full, true and correct copy of the entire record in the above-entitled cause as the originals thereof remain of record in my office.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 8th day of February, 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

Endorsed on cover: Case No. 16,543. U. S. cir. ct. of appeals, 9th circuit. Term No., 764. The Anglo-Californian Bank, Limited, petitioner, *vs.* The Secretary of the Treasury. Filed March 29, 1897.

MAR 30 1897
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 764.

THE ANGLO-CALIFORNIAN BANK (LIMITED),
PETITIONER,

vs.

THE SECRETARY OF THE TREASURY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JESSE W. LILIENTHAL,
J. F. EVANS,
Attorneys and Counsellors for Petitioner.

JOSEPH H. CHOATE,
Of Counsel.

(16,543)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 764.

ANGLO-CALIFORNIAN BANK, LIMITED (A CORPORATION), PETITIONER.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals of and for the Ninth Circuit to Certify to the Supreme Court for Review and Determination the Case of Anglo-Californian Bank, Limited (a Corporation), Appellant, versus Secretary of the Treasury, Appellee.

To the Honorable the Supreme Court of the United States:

The petition of Anglo-Californian Bank, Limited (a corporation), respectfully shows:

I. That petitioner is and at all the times hereinafter mentioned was a corporation organized under the laws of the Kingdom of Great Britain and Ireland, having a place of business at San Francisco, California.

II. That between the 2d day of March, 1887, and the 24th day of June, 1887, inclusive, the Bank of California,

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II. That between the 2d day of March, 1887, and the 24th day of June, 1887, inclusive, the Bank of California,

a corporation doing business in San Francisco, California, acting on behalf of the Oregon Pacific Railroad Company, a corporation, made five certain importations into the United States, at the port of San Francisco, of steel railroad rails, known as T rails, aggregating 5,678 tons.

III. That said rails remained in general order, unclaimed, until the 27th day of February, 1888, when a warehouse entry for each of said five importations was made by said Bank of California, as importer and consignee, and the duties thereon liquidated at the rate of $17 per ton under the provisions of the tariff act of March 3, 1883, then in force, and the same, aggregating about $96,557.73, were duly secured by bond, and at the expiration of one year from the respective dates of importation additional duties at the rate of 10 per centum were charged upon the bonds under the provisions of section 2970, Revised Statutes, aggregating $9,655.77.

IV. That between the 1st day of September, 1888, and the 6th day of December, 1889, inclusive, four several withdrawals of said rails were made for consumption at the aforesaid rates of regular and additional duty, aggregating $29,192.20, which was paid.

V. That within the bonded period of three years, but when the same was about to expire, said Oregon Pacific Railroad Company, upon whose account, as above stated, said rails were imported, represented to the Secretary of the Treasury that serious casualties had occurred to its road by storms and floods, with consequent embarrassment to its affairs, and requested a postponement of the sale required by the provisions of section 2971, Revised Statutes, on expiration of the bonded period; whereupon the Secretary of the Treasury authorized the withdrawal of the merchandise from such sale for a period of three months from and after

the expiration of said bonded period, which withdrawal from sale was suffered without notice to or consent of the principal or sureties on said warehouse bonds.

VI. That at the expiration of the said three months a further postponement of six months was authorized by the Secretary of the Treasury, and thereafter similar postponements were authorized by the Secretary of the Treasury up to the time of and after the protest hereinafter mentioned, the said Bank of California, nominal importer and consignee, in two instances uniting in the application for delay, and in one instance delay being suffered only on the consent thereto of the sureties on the said warehouse bonds.

VII. That pending the above postponement withdrawals for consumption of said rails were from time to time permitted and made, in small lots, the duty, regular and additional, exacted on such withdrawals being in pursuance of instructions to that effect from the Treasury Department, fixed at the rate prescribed by said tariff act of March 3, 1883, notwithstanding that such act had prior to such withdrawals been superseded by the tariff act of 1890, and later by that of 1894.

VIII. That notwithstanding the instructions aforesaid twelve withdrawals of said rails were thereafter made at the rate of duty prescribed by said superseding act of 1890, to wit, at the rate of $13.44 per ton instead of $17 per ton, together with the 10 per cent. additional duty.

IX. That after the aforesaid withdrawals there remained in warehouse at the time of the protest hereinafter mentioned about 2,372 tons of said rails, the same remaining in the custody of the Government at the risk and expense of the importer, and all charges thereon, including storage, were paid.

X. That subsequently to the passage of the tariff act of 1894, to wit, in or about the month of March, 1895, petitioner, having thereto succeeded to all the right, title, and interest of said Bank of California in and to said steel rails, offered to the Secretary of the Treasury to make withdrawal entry of said remaining rails at the rate of duty prescribed by said tariff act of 1894, which offer was by the Secretary rejected; but for the purpose of testing the right of the Government to exact duty on the rails under a repealed act on the theory that the duties at a fixed rate became a right accrued and indefeasible upon the expiration of the bonded period, because "regarded as abandoned" to the Government on such expiration, the Secretary authorized petitioner to make withdrawal entry of a portion of said remaining rails on payment of the duty prescribed by said superseded act of 1883.

XI. That in pursuance of said authority and purpose petitioner on the 15th day of March, 1895, withdrew for consumption twenty of said steel rails weighing about five tons and duty thereon liquidated and assessed by the collector of customs of the port of San Francisco at the said rate of $17 per ton under the provisions of the tariff act of March 3, 1883, and 10 per cent. additional duty, aggregating $92.20, was duly paid by petitioner to said collector on said 15th day of March, 1895.

XII. That within ten days after such liquidation, assessment, and payment, to wit, on the 18th day of March, 1895, petitioner gave written notice of protest, which is the protest hereinbefore referred to, against said liquidation, assessment, and payment, which protest distinctly and specifically set forth the reasons for the objection of the petitioner as follows: That the said twenty steel rails having been continued in bonded warehouse, under terms of original warehouse bond, with the sanction of the Secretary of the Treas-

ury, all charges, including storage, having been paid thereon by the importer, no legal abandonment to the United States ensued; that duty should be assessed on said steel rails at the rate of $\frac{7}{20}$ of one cent per pound only, under paragraph 117, Schedule C, act August 28, 1894; that the importer paid the duty levied under protest and solely to obtain possession of said twenty rails, and that said withdrawal entry should be adjusted and the amount of overcharge refunded to petitioner.

XIII. That on the 19th day of April, 1895, the board of United States general appraisers sustained petitioner's said protest and reversed the said action of the collector of customs of the port of San Francisco, and in and by its decision in that behalf rendered said board held that said twenty steel rails having been withdrawn for consumption after August 28, 1894, were dutiable at $\frac{7}{20}$ of one cent per pound under the provisions of paragraph 117, act of 1894, applicable to T rails.

XIV. That on the 17th day of May, 1895, an appeal from said decision of the board of United States general appraisers to the circuit court of the ninth circuit was regularly taken by the Secretary of the Treasury, and on said appeal the said court found the facts of said appeal to be as hereinbefore set forth, and as conclusion of law therefrom found that at the expiration of three years from the time of the original importation of said rails, to wit, the 24th day of June, 1890, the same became abandoned to the United States and subject to sale as such under sections 2970, 2971, and 2972, Revised Statutes, to satisfy the duties and charges thereon then in force, to wit, the duty of $17 per ton, under paragraph 147 of the tariff act of March 3, 1883, and 10 per cent. thereon, with warehouse charges; that the right of the United States to sell said merchandise at said time and deduct from the proceeds said

amount, duties, and charges was a right accrued at said time to the United States and a liability incurred by said merchandise and the importers thereof, within the meaning of section 29 of the customs administrative act of June 10, 1890, section 55 of the tariff act of October 1, 1890, and section 72 of the tariff act of August 28, 1894, and hence was preserved to the United States by said acts, and is now in full force and effect; that the amount of duty and charges properly assessed against the importer thereof were those in force at the time of the expiration of three years from the date of importation, to wit, the 24th day of June, 1890, as provided in said tariff act of March 3, 1883; that the withdrawal entry of said rails was properly liquidated by said collector of customs, and the amount of duties and charges exacted and collected by said collector upon the withdrawal of said merchandise from bond, to wit, the sum of $92.20, was lawfully exacted and collected, whereupon, on the 7th day of November, 1895, the said court ordered and adjudged that the said decision of the board of United States general appraisers be set aside.

XV. That petitioner duly appealed to the circuit court of appeals of the ninth circuit from said judgment of the circuit court; and thereafter, to wit, on the 19th day of October, 1896, the said circuit court of appeals made and gave its judgment, affirming the said judgment of the circuit court.

XVI. That a certified copy of the records, papers, and proceedings on file and of record on said appeal to the circuit court of appeals accompanies this petition, and the same is hereby referred to for all the matters and things therein contained pertinent to the hearing and understanding of this petition.

XVII. And petitioner further represents that the litigation above detailed involves a question of great magnitude and concern as well to the Government as to importers, which has never been made the subject of authoritative decision by this honorable Court, to wit, the rate of duty to be collected on imported merchandise remaining in bonded warehouse more than three years, by permission of the Secretary of the Treasury, and subsequently entered for consumption by authority of said Secretary of the Treasury.

The said litigation involves the question of the right of the Government to collect duty on imported merchandise withdrawn for consumption at a rate prescribed by a tariff act not in force or effect at the time of withdrawal, but repealed and superseded by an act prescribing another and different rate of duty.

The said litigation also involves the question of the intention of Congress to impose two different and distinct rates of duty upon merchandise of the same character and description withdrawn for consumption in the United States at the same time.

The said litigation also involves the interpretation and scope of the words "regarded as abandoned," as used in section 2971, Revised Statutes of the United States, providing for the disposition of goods remaining in bonded warehouse more than three years, and also the definition of the authority conferred by law upon the Secretary of the Treasury over imported merchandise remaining in bond more than three years from the date of importation.

The said litigation also involves the question of the estoppel of the Government to claim that the goods are to be regarded as abandoned when the importer has been lulled into a sense of security by the action of the Secretary of the Treasury in granting an extension of time after three years from date of importation.

The said litigation also involves the determination of the

policy of the Government to impose forfeiture upon importers under the guise of a so-called accrued or vested right to duties prescribed by a defunct act.

Petitioner thus respectfully submits that the questions herein presented should be finally adjudged by this honorable Court upon and after full presentation thereof on the part of both appellant and appellee.

Wherefore petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States circuit court of appeals of the ninth circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case therein entitled The Anglo-Californian Bank, Limited, appellant, *versus* The Secretary of the Treasury, appellee, number 273, to the end that the case may be reviewed and determined by this Court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that petitioner may have such other or further relief or remedy in the premises as to the Court may seem appropriate and in conformity with the said act, and that the said judgment of the said circuit court of appeals in the said case and every part thereof may be reversed by this honorable Court.

And your petitioner will ever pray, etc.

ANGLO-CALIFORNIAN BANK, LIMITED,
Petitioner,

By JESSE W. LILIENTHAL,
J. F. EVANS,
Attorneys and Counselors for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 764.

THE ANGLO-CALIFORNIAN BANK, LIMITED,

vs.

THE SECRETARY OF THE TREASURY.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

JESSE W. LILIENTHAL,
J. F. EVANS,
Attorneys and Counsellors for Petitioner.

JOSEPH H. CHOATE,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 764.

THE ANGLO-CALIFORNIAN BANK, LIMITED,

vs.

THE SECRETARY OF THE TREASURY.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SUMMARY STATEMENT OF FACTS.

The petition relates to a customs-revenue case to which the United States is a party. It concerns the legal *status* and the rate of duty on imported merchandise which by consent of the Government remained in bonded warehouse for more than three years, and was subsequently withdrawn for consumption.

The importation was made at the port of San Francisco, in 1887, by the Bank of California, and consisted of 5,678 tons of railway bars, then dutiable at the rate of $17 per ton.

Warehouse entries were made in 1888, the duties assessed at the rate stated, and bond given for their payment.

No part of the merchandise was withdrawn for consumption within one year; wherefore the additional duty of 10 per cent. was charged under section 2970, Revised Statutes, on all the merchandise, making the duty rate $18.70 per ton.

Subsequently, and within three years from the dates of importation, part of the rails were withdrawn for consumption upon payment of duty at $18.70 per ton.

Before the three years expired, at the end of which period the Government would be at liberty to sell the goods remaining in bonded warehouse to satisfy the unpaid duties, the Secretary of the Treasury, upon request of the importer, ordered that they be not sold within a period of three months after the expiration of the bonded period of three years.

Thereafter, from time to time, the Secretary renewed this order of postponement, and from time to time the importer made withdrawal entries for consumption and paid the duty of $18.70 per ton.

When the tariff act of 1890, which reduced the duty on railway bars to $13.44 per ton, went into operation, the orders of postponement of public sale of the rails in bond were still operating, and withdrawals in small lots thereafter continued at the new rate, with the 10 per cent. additional added.

In 1894, when a new tariff act went into effect, which further reduced the duty to $7.84 per ton and abolished the 10 per cent. additional duty, there remained in bonded warehouse about 2,372 tons subject to sale as abandoned

goods. A test case was, by agreement, made by the withdrawal of five tons, upon which duty was exacted at $17 per ton, with the 10 per cent. added. Against this exaction the importer protested, claiming that the rails were dutiable at the rate prescribed by the tariff law in force at the time of withdrawal, to wit, $7.84 per ton. This protest was sustained by the board of general appraisers. (Tr., p. 16.)

From this decision of the board an appeal was taken by the Secretary of the Treasury to the United States circuit court sitting at San Francisco, which reversed the decision of the board, and sustained the original assessment. (Tr., p. 24.)

The case was then appealed to the United States circuit court of appeals, which in October, 1895, affirmed the judgment of the court below. (Tr., p. 45.)

This decision the petitioner desires to have reviewed by this Court.

BRIEF IN SUPPORT OF THE PETITION.

The case is much more than a question of the legal rate of duty on the five tons of steel rails directly involved. Other protests on the remainder of the 2,372 tons, subsequently withdrawn on payment of the duties at the rate of $18.70 per ton, are pending the determination of this case, and by reason of the warehouse bonds held by the Government it extends to all the withdrawal entries made in good faith at the tariff rate of 1890 as well as similar questions arising in other suits pending in the circuit court at San Francisco as to the rate of duty to be collected on merchandise withdrawn for consumption after three years from the

date of importation, where the rate of duty has, meantime, been either increased or decreased.

It involves the correctness of the practice of the Government, in cases where one rate of duty was in force at the time of importation and another at the time of withdrawal, of exacting the higher of the two rates on goods withdrawn after the expiration of the bonded period.

It involves the question whether general saving clauses or general saving words in general repealing clauses as to "accruing and accrued rights" nullify the plain and specific provisions of a tariff schedule as to the rate of duty to be collected on merchandise withdrawn for consumption.

These and those questions recited on page 7 of the petition involve the construction of several provisions of the Federal statutes.

The decision of the court below, being in conflict with a decision of the Court of Claims involving the same questions, furnishes an additional reason for the adjudication by this Court of the questions involved. (Tr., pp. 50, 51.)

It is not proper to discuss here the spirit and reason of the law applicable to the case. It is submitted, however, with confidence, that the petition, the transcript of record, and this brief contain reasons sufficient, in the interest of correct as well as certain administration of the customs laws, public policy, and private right, to satisfy this honorable Court that the questions involved should be reviewed by the tribunal of last resort.

JESSE W. LILIENTHAL,
J. F. EVANS,
Attorneys and Counsellors for Petitioner.

FILED,
APR 30 1897
JAMES H. McKENNEY,
CLERK.

166-922

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ANGLO-CALIFORNIAN BANK, LIMITED,
v.
THE SECRETARY OF THE TREASURY.
} No. 764.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE ANGLO-CALIFORNIAN BANK, LIMITED,
v.
THE SECRETARY OF THE TREASURY. } No. 764.

The only reply which I think it necessary at this time to make to the application for a writ of certiorari to the United States court of appeals for the ninth circuit is to invite attention to the opinion of the circuit court of appeals as found reported in 76 Fed. Rep., 742.

HOLMES CONRAD,
Solicitor-General.

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CLERK

UNITED STATES SUPREME COURT.

IN THE MATTER

OF

The petition of JOHN H. STARIN, owner of the Steamtug "TITAN" and the Steamboat "THOMAS HUNT," their Engines, &c., for a Writ of Certiorari to the U. S. Circuit Court of Appeals, for the Second Circuit in the action of MARION E. LEGG, *et al*, Administrators of WILLIAM E. LEGG, deceased, and others.

vs.

The Steamtug "TITAN" and the Steamboat "THOMAS HUNT," their Engines, &c., JOHN H. STARIN,

Claimant.

COPY.

PETITION FOR WRIT OF CERTIORARI.

JOHN A. DEADY,
HENRY W. GOODRICH,
Counsel for Petitioner.

B. H. TYRREL, Printer, 74 Maiden Lane, N. Y.

U. S. Supreme Court.

In the Matter

of

The Petition of JOHN H. STARIN owner of the steamtug "TITAN" and the steamboat "THOMAS HUNT," their Engines, etc., for a writ of certiorari to the U. S. Circuit Court of Appeals for the Second Circuit, in the action of MARION E. LEGG *et al.*, Administrators of WILLIAM E. LEGG, deceased, and others,

vs.

The steamtug "TITAN" and the steamboat "THOMAS HUNT," their Engines, &c., JOHN H. STARIN, Claimant.

The petition of John H. Starin respectfully shows to this Court:

First.—That on the 26th day of June, 1893, the libellants filed their libel in the United States District Court for the Southern District of New

4 York against the two above-mentioned boats, together with the steamtug *Unit*, praying damages for a collision in which the schooner *Isle of Pines*, the property of the libellants, was sunk.

Second.—The steamtug *Unit*, which was a small and comparatively valueless boat, was sold under process herein, and the net balance, after paying the proceeds of the sale, amounting to the sum of $151.25, was paid into the Registry of the Court.

Third.—Thereafter, and in May, 1894, the case was tried before Hon. Addison Brown, U. S.
5 District Judge, and an opinion was rendered by him in which he held all three vessels responsible for the libellants' damages, and directed a decree to be entered against them all.

Fourth.—Such proceedings were thereafter had that a final decree was, on the 7th of November, 1895, entered in the office of the Clerk of the Southern District of New York, whereby the damages were fixed at the sum of $6,083.62, and the costs were taxed at the sum of $288, making a judgment in all of $6,371.62.

6 *Fifth.*—That thereafter an appeal was taken from said decree to the U. S. Circuit Court of Appeals for the Second Circuit, which Court, after argument, affirmed the decree of the Court below directing the enforcement of the stipulation and undertakings in the sum of $6,429.02, with interest. A copy of the opinion of the said Circuit Court of Appeals is hereto annexed, marked "Exhibit A."

Sixth.—That the circumstances under which the collision occurred were as follows:

On the 19th day of June, 1893, the steamtug *Unit* with the schooner *Isle of Pines* on her starboard side and the schooner *Ella Frances* on her port side, was proceeding up the westerly channel between Blackwell's Island and New York City. A portion of the chart showing the place in question is hereto attached, marked "Exhibit B." The tide at the time was strong flood, and the *Unit* and her tow were in the strength of the tide. The steamboat *Thomas Hunt*, having in tow on her starboard side the excursion barge *Vanderbilt* and on her port side the excursion barge *Warren*, assisted by the steamtug *Titan* ahead of the *Hunt* on a hawser about thirty fathoms in length, had gone up the East Channel and had rounded the head of the Island bound for the foot of Eighty-sixth street, New York City. Before reaching the head of the Island, over which there is clear sight from one channel to the other, the *Titan* had given a signal of one long whistle, indicating that she was to round the Island and proceed to New York, a signal well understood by custom. When the *Titan* was off the head of the island and about 200 feet away in the true tide, pointed to the westward, she gave a signal to the *Unit* of one whistle, indicating that she would hold her course. The *Unit* at this time was about 1,700 feet away from the *Titan*.

7 8 9

This signal was answered by the *Unit* with an assenting signal of one whistle. At the time of the interchange of the whistles the positions of the respective fleets were such that the *Unit* and her tow had the *Titan* and her tow on their starboard side and were obliged to avoid the *Titan*—not only by the rules of the road, but by the assenting signals.

10 *Seventh.*—Shortly before the collision, seeing that one was inevitable, the hawser from the *Titan* was thrown off and the *Hunt* backed. The vessels came together, the barge on the starboard side of the *Titan* striking the *Isle of Pines*, which was on the starboard side of the *Unit*, near the bow, resulting in the sinking of the *Isle of Pines*.

Eighth.—It is undisputed that at the time and before the time of the collision there was no person at the helm of either the *Isle of Pines* or the *Ella Frances*.

11 *Ninth.*—The District Court held both vessels in fault, and the decree was affirmed by the Circuit Court of Appeals. The practical result of the decree is that your petitioner, the owner of the *Hunt* and the *Titan*, pays the entire damages, inasmuch as there was in the Registry of the Court only the sum of $151 available to pay the *Unit's* portion of the damages.

Tenth.—Your petitioner is advised that both the District Court and the Circuit Court of Appeals were in error in the following particulars:

12 1. That the libellants were not held responsible for the damages, or a portion of them, in consequence of having no person at the helm of their vessel.

2. In that the Court did not find the *Titan* and the *Hunt* free from blame, in holding her course until a maneuver *in extremis* became necessary, inasmuch as the *Titan* and her fleet had the right of way, both by the assenting signals and the rules of the road.

3. In that the Court found that the navigation of

the *Titan* and *Hunt* in rounding the head of Black- 13
well's Island was not careful and proper.

WHEREFORE, your petitioner prays that this Honorable Court would be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals of the United States for the second Circuit to bring up this case to this Honorable Court for such proceedings therein as to the Court shall seem just.

Southern District of New York, ss. :

14

HOWARD CARROLL, being duly sworn, says that he is the agent of the petitioner herein; that he has read the foregoing petition, and that the same is true to the best of his knowlege, information and belief.

HOWARD CARROLL.

Sworn to before me this
13th day of April, 1897.

WM. C. FOSTER.
[SEAL.] Notary Public,
Kings County.

Certificate filed in New York County.

15

I hereby certify that I have examined the foregoing petition, and that in my opinion the same is well founded, and that the case is one in which the prayer of the petitioner should be granted.

HENRY W. GOODRICH.

16 **Exhibit A.**

U. S. CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

LEGG *et al.*, Administrators, &c., Appellees,

vs.

The Steamtug "TITAN" and the Steamboat "THOMAS HUNT," etc., Appellants.

17

WALLACE, Circuit Judge:

This is an appeal by the owners of the steam vessels the *Titan* and the *Thomas Hunt* from a decree condemning them, together with the steamtug *Unit*, for the loss of the schooner *Isle of Pines* and her cargo in consequence of a collision between the schooner and a barge in tow of the *Titan* and the *Hunt*. The owner of the *Unit* has not appealed, and the sole question, therefore, is whether there was contributory fault on the part of the appellants' vessels in causing the collision. The collision took place in the East river in the forenoon of June 19, 1893, in the westerly channel, near the upper end of Blackwell's Island, and opposite of Eighty-sixth street, New York City.

18

The steamtug *Unit*, having in tow the schooner *Isle of Pines* lashed on her starboard side, and the schooner *Ella Frances* lashed on her port side, was proceeding up the westerly channel of the river between New York City and Blackwell's Island on

a flood tide of about six miles an hour making a 19
speed in addition of about two miles an hour.

The steamboat *Thomas Hunt* with the steamtug *Titan* ahead, attached to the *Hunt* by a hawser about thirty fathoms long, the *Thomas Hunt* having two barges in tow, the *Vanderbilt* lashed on her starboard side and the *Warren* lashed on her port side, each projecting about twenty-five feet beyond her stem, were proceeding up the easterly channel of the river, intending to land at Eighty-sixth street on the westerly side of the East river. The *Hunt* with her fleet was making a speed of about ten miles an hour with the tide, which was 20
running in that channel at about five miles. Shortly before reaching the other end of the island the *Hunt* discovered across the island the *Unit* and her tow, the latter at the time being nearer the Blackwell's Island shore than the New York shore, nearly opposite Eighty-fifth street, and not far behind the *Hunt*. Before turning to cross the head of the island the *Titan* had blown a long whistle indicating her intention to land at Eighty-sixth street, but this was not heard by the *Unit*. After she had turned to cross the river to her landing and while the *Hunt* was rounding the head of the island the *Titan* blew another whistle to the *Unit* 21
indicating her intention to cross the river in front of the *Unit*. The *Unit* immediately answered the signal with a single blast of her whistle, and followed this very quickly with alarm whistles, and reversed her engine. The *Titan* cast off the hawser of the *Hunt*, and the *Hunt* reversed her engines; but the bow of the *Isle of Pines* came in collision with the bow of the *Vanderbilt*, causing the *Isle of Pines* to sink. When the alarm signals were given the *Titan* was making directly across the river and

22 had passed or was passing in front of the *Unit*, and the *Unit* had headed somewhat to the easterly in the attempt to pass astern of the *Hunt*.

We are satisfied, upon a careful reading of the proofs, that when the *Titan* rounded the head of the island to cross the river, she did not make sufficient allowance for the inability of the *Unit* to control her tows in the strong tide and reduce her speed sufficiently to pass between the *Hunt* and the head of the island, and that this was due to the failure of the pilot of the *Titan* to vigilantly observe the *Unit*. The *Unit* was an old and small tug, and both of her tows were deep-laden with
23 cargo, and her power was insufficient to hold her tows against the strong flood tide. If the pilot of the *Titan* had carefully observed her when he began to shape the course of his vessel to cross her bows, he would have discovered that, encumbered as she was, she could not check her speed efficiently and quickly change her course, and that unless she could she would be unable within the time required to pass astern of the *Hunt* without risk of collision. There was plenty of room for the *Titan* to allow a larger margin of safety for the maneuver. If the *Titan* had kept further
24 away in the direction of Mill Rock, as she might have done, all hazard would have been avoided. This would have been more inconvenient for the *Titan*, but it was obviously the more prudent course. The answering signal from the *Unit*, given as it was when the risk of collision was so obvious that it was immediately followed by her alarm whistles, had no appreciable effect upon the conduct of the *Titan* or the *Hunt*. We agree with the District Judge that the attempt by the *Titan* and the *Hunt* to cross the bow of the *Unit* was

dangerous and unjustifiable in the circumstances of the situation.

The decree is affirmed with interest and costs.

Endorsed—U. S. Cir. Ct. of Appeals, Second Cir.—Legg *et al.* Administrators, etc., Appellees, *vs.* The Steamtug "Titan" and the Steamboat "*Thomas Hunt*," etc., Appellants.—WALLACE, Cir. Judge.—United States Circuit Court of Appeals, Second Circuit, Filed Feb. 23, 1897, James C. Reed, Clerk.

166-722

FILED
APR 26 1897
JAMES H. McKENNEY,
CLERK

166-722 787

Supreme Court of the United States.

IN THE MATTER

OF

The petition of JOHN H. STARIN, owner of the Steamtug "TITAN" and the Steamboat "THOMAS HUNT," their Engines, &c., for a Writ of Certiorari to the U. S. Circuit Court of Appeals, for the Second Circuit in the action of MARION E. LEGG *et al*, Administrators of WILLIAM E. LEGG, deceased, and others,

vs.

The Steamtug "TITAN" and the Steamboat "THOMAS HUNT," their Engines, &c., JOHN H. STARIN,
Claimant.

MEMORANDUM IN OPPOSITION TO PETITION.

HENRY GALBRAITH WARD,
Advocate.

B. H. TYRREL, Printer, 74 Maiden Lane, N. Y.

United States Supreme Court.

In the Matter

of

The Petition of JOHN H. STARIN, owner of the steamtug *Titan* and the steamboat *Thomas Hunt*, their engines, etc., for a Writ of Certiorari to the U. S. Circuit Court of Appeals for the Second Circuit, in the action of MARION E. LEGG *et al.*, Administrators of WILLIAM E. LEGG, deceased, and others,

vs.

The steamtug "TITAN" and the steamboat "THOMAS HUNT," their engines, etc., JOHN H. STARIN, Claimant.

To the Honorable the Supreme Court of the United States:

The Proctor representing Marion E. Legg and others, begs leave to file the following memorandum in opposition to the petition of John H. Starin, for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

First.—For a statement of the facts of the collision the Court is respectfully referred to the brief on behalf of libellants and appellees, used in the United States Circuit Court of Appeals and submitted herewith.

Second.—The petitioner asks (fol. 13 of Petition,) that this Honorable Court would be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals of the United States for the Second Circuit.

It is respectfully submitted that the mandate of the Circuit Court of Appeals having been filed in the United States District Court, said mandate having been issued under an order of the Circuit Court of Appeals, which order was approved as to form, and entry consented to by the proctors for the petitioners herein, and was entered on the 8th day of March, 1897, a copy of which is hereto annexed marked "A," that a writ of *certiorari* cannot now be directed to that Court.

After the filing of the said mandate, issued in pursuance of the said order, an order was duly entered on the 12th day of March, 1897, in the U. S. District Court for the Southern District of New York, making the said judgment of the said Circuit Court of Appeals the judgment of the said District Court, a copy of which order is hereto attached marked "B."

It is also respectfully submitted that upon the filing of the said mandate in the said U. S. District Court, the jurisdiction of the said United States Circuit Court of Appeals ceased, and especially upon the entry of the order on the said mandate in the said District Court.

Third.—A writ of certiorari this Court has de-

clared is only allowed when questions of gravity and importance are involved. If the counsel for the petitioner believed that question or questions of gravity and importance were involved, it is hardly to be believed that the order marked "A" annexed hereto would have been "approved as to form an entry consented to." Instead of approving the said order as to form and consent to entry, application would have been immediately made to this Court for the writ of certiorari now applied for.

Fourth.—The application is based upon a petition verified by one Howard Carroll (fol. 14 of petition), who says he is the agent of the petitioner, and using this language, "that he has read the "foregoing petition and that the same is true to "the best of his knowledge, information and be-"lief." It does not appear that he has any knowledge or information concerning any of the matters alleged in the petition, or that he ever sought to acquire knowledge or information with regard thereto. Not even his authority, if any he has, to verify the petition, has been presented. The writ of certiorari is asked for on this petition, which, it is submitted, shows that there is no question of gravity and importance involved. With the petition is to be submitted (see page 8 of petitioner's brief) on this application the brief used on behalf of the petitioner in the Circuit Court of Appeals. The record of the cause in the Circuit Court of Appeals is withheld. The practice is that the petitioner prepares his petition and *must attach thereto a certified copy of the entire record of the case* in the *Circuit Court of Appeals*, and also furnish to the Clerk of the Supreme Court a printed

copy of the petition and of the *record for each of* the Justices of the said Court (see Sec. 644, Benedict's Admiralty, 3d ed., p. 378, and Rule 37 of this Court, Sec. 3).

Fifth.—On reference to the brief submitted herewith used in the Circuit Court of Appeals on behalf of the appellees, it will be seen that the starboard hand rule did *not* exist in this case, but in addition to what has been set forth in the said Circuit Court of Appeals brief, if the starboard hand or the fourth situation existed, as claimed by the petitioner (see page 15, point 12, of his brief used in the Circuit Court of Appeals), then his vessels did not conform with the rule (see Inspector's Rules herewith submitted, pp. 61–62). The rule says: "This is a situation requiring great caution; "the red light of B in view to A, and the green "light of A in view to B, will inform both that "they are approaching each other in an oblique "direction. A should put his helm to port and "pass astern of B, while B should continue on his "course, or port his helm if necessary to avoid "collision.

Wilson, captain of the *Hunt*, admits that the *Titan* in making a cross for the New York shore was under a starboard wheel going to port (fol. 479 of Record), and (fol. 480), "the *Hunt* was follow- "ing as closely as possible in her wake."

"Q. And you were on the starboard wheel?

"A. Yes, sir; partly so."

It will thus be seen that here was a clear violation of the rule applicable to the fourth situation, and instead of the *Hunt* and *Titan* maintaining their course or porting their wheels to avoid collision, and thus keep to the right, they acted di-

rectly to the contrary by operating under a starboard wheel, thus going to the left and taking from the *Unit* the water space belonging to her.

Sixth.—The *Unit* and her tow was proceeding up the middle of the channel when she observed the *Titan*, and, as found by the Circuit Court of Appeals (fol. 22 of Petition), the *Unit* had headed somewhat to the easterly in the attempt to pass astern of the *Hunt*. Thus it will be seen that there was a change of course on the part of the *Unit* to enable the *Hunt* and her fleet to more readily clear her and her tow. The evidence also shows that the collision occurred about one-third of the way from the Blackwell's Island shore, the channel being narrow at that point, thus giving two-thirds of the channel to the *Titan* and the *Hunt* to have cleared the *Unit* and her tow, if they had kept within the true tide and not sought the dangerous method of passing through the eddy on the upper end of Blackwell's Island, and not only passing through the eddy, but maintaining a starboard wheel, which would have the effect of bringing the *Hunt* and her tow down on to the *Unit* and her tow.

Seventh.—The attempt to impute fault to the schooner *Isle of Pines* utterly failed in both the District and the Circuit Court of Appeals. The petitioner is in error when he says that it is undisputed that there was no one at the wheel of the schooner (see Point 19 of Libellant's and Appellee's Brief in the Circuit Court of Appeals, p. 22. In addition to the testimony therein referred to, Vanderzee, the mate of the schooner, says "that "his captain stood aft, in case any orders was to "be given" (fol. 152 of Record). Vanderzee also

says that he observed the *Titan* and *Hunt* rounding Blackwell's Island Point from the East Channel, and "that nothing could have been done "by the *Isle of Pines* to have avoided the collision."

The petitioner treats this case more like one where the vessels were astern, and being towed on a hawser instead of lashed alongside the tug. The *Isle of Pines* being lashed alongside of the tug, it was her duty not to make any change in her helm unless ordered by the captain of the tug that had her in tow.

The petitioner has also attempted to show that but a slight change of course, on the part of the *Isle of Pines* and the schooner *Ella Frances* and the tug *Unit* from their original course would have resulted in avoiding the collision. As before shown, the *Unit* did make a change of course from proceeding up the middle of the channel to reaching one-third of the distance from the Blackwell's Island shore, and still the collision resulted; besides, not only did the petitioner's fleet come in contact with the *Isle of Pines*, on the starboard side of the *Unit*, but also in collision with the schooner *Ella Frances* on the port side of the tug, thus showing that whichever barge of petitioner's fleet first struck the schooner *Isle of Pines*, that it would have taken more than a slight change of course in the *Unit* and her fleet to have escaped collision.

Eighth.—The petitioner advances much faith in the testimony of the Master of the *Hunt* and her pilot, and especially with reference to their testimony, as to conclusions, but the difficulty in the case, was, that their testimony is utterly irreconcilable with the conditions that prevailed.

Ninth.—The learned advocates for the petitioner seem to rely very very much on the "average of all the evidence" (see page 8, Petitioner's Brief, in this Court; and also page 11 of his Brief in the U. S. Circuit Court of Appeals), in framing their arguments; but the learned Courts that have passed upon this case have, beyond question, adopted the proper method in reaching their conclusions, not on "averaging all the testimony," but selecting such as was reconcilable with the undisputed conditions and circumstances.

Tenth.—The distance that the petitioner claimed the *Unit* traveled of nearly seventeen hundred feet from the time of the signal whistle of the *Titan*, to the collision, is not supported by the evidence, and the learned Courts have refused, as they very properly did, to accept this as a fact.

It is respectfully submitted that this case involves only questions of fact, and the learned Courts below, not having found that the schooner *Isle of Pines* in any way contributed to the collision, the application for a writ of certiorari should be denied.

HENRY GALBRAITH WARD,
Advocate for Marion E. Legg *et als.*

"A."

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the United States Court Room, in the City of New York on the 8th day of March, in the year of our Lord, one thousand eight hundred and ninety-seven.

MARION E. LEGG and Others, as Administrators of WILLIAM H. LEGG, deceased, and others,
Libellants and Appellees,

against

The Steamtug "TITAN" and the Steamboat "THOMAS HUNT," their engines, etc. JOHN H. STARIN,
Claimant and Appellant,
Impleaded with the Steamtug "UNIT."

This cause having come to be heard on the appeal of John H. Starin, claimant and appellant of the steamtug *Titan* and the steamboat *Thomas Hunt*, their engines, etc., from the decree of the District Court of the United States for the Southern District of New York, entered herein on the 7th day of November, 1895; now, on motion of Macklin & Adams, proctors, for the libellants and appellees, it is

ORDERED, that the said decree be and the same hereby is, affirmed with interest and the costs of this Court, and that a mandate issue to said District Court directing said Court to proceed in accordance with the opinion of this Court.

W. J. W.,
E. H. L.,
N. S.

Approved as to form, and entry consented to.

GOODRICH, DEADY & GOODRICH,
Proctors for Claimant and Appellant.

Endorsed.—U. S. Circuit Court of Appeals, Second Circuit—Marion E. Legg and others, as Administrators of William H. Legg, deceased, *against* the steamtug *Titan*, steamboat *Thomas Hunt*, and John H. Starin, claimant and appellant, Impleaded with tug *Unit*.—Order of affirmance. Stewart & Macklin, Proctors for Libellant.—United States Circuit Court of Appeals, Second Circuit.—Filed March 10.—J. C. Reed, Clerk

"B."

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court rooms, in the City of New York, on the 12th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

Present—The Honorable ADDISON BROWN,
District Judge.

MARION E. LEGG and others, Administrators, &c., *et al.*,

vs.

The Steamtug "TITAN" and Steamboat "THOMAS HUNT," their engines, impleaded, &c.

The mandate of the United States Circuit Court of Appeals for the Second Circuit having been this day presented and filed in this Court, wherein it is recited that the decree of the Court in this cause having been brought by an appeal into the said Circuit Court of Appeals, and that on consideration thereof it has been ordered, adjudged and decreed by said Court as follows:

"Ordered, that the said decree be, and the same "hereby is, affirmed with interest and the costs of "this Court taxed at the sum of fifty-seven dollars "and forty cents."

And in and by which mandate this Court is commanded that such further proceedings be had in this cause as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding, in conformity with the opinion of said Court.

Now, therefor, on motion of Stewart & Macklin, proctors for the libellants,

IT IS ORDERED, That the judgment of the said Circuit Court of Appeals recited in said mandate be, and the same hereby is, made the judgment of this Court; and it is further

ORDERED, that in addition to the sum specified in the decree of this Court so affirmed as aforesaid, to be recovered by the libellants as damages, interest and costs against the appellant and claimant herein the said libellants do recover from the said claimant and appellant, the further sum of fifty-seven dollars and forty cents costs upon the said appeal, as taxed, together with interest on the amount of said decree of this Court, from the date of the entry thereof in this Court.

ADDISON BROWN.

Endorsed.—United States District Court—for the Southern District of New York—Marion E. Legg, Adm'r, &c., *vs.* The Steamtug *Titan* and Steamboat *Thomas Hunt*, their engines, &.—Stewart & Macklin, Proctors for Libellant—Order and mandate filed the 12th day of March, 1897.

166-722-787

APR 26 1897

CLERK.

UNITED STATES SUPREME COURT.

IN THE MATTER

OF

The petition of JOHN H. STARIN, owner of the Steamtug "TITAN" and the Steamboat "THOMAS HUNT," their Engines, &c., for a Writ of Certiorari to the U. S. Circuit Court of Appeals, for the Second Circuit in the action of MARION E. LEGG, *et al*, Administrators of WILLIAM E. LEGG, deceased, and others,

vs.

The Steamtug "TITAN" and the Steamboat "THOMAS HUNT," their Engines, &c., JOHN H. STARIN,
Claimant.

Brief of Petitioner in Support of Application For Writ of Certiorari.

JOHN A. DEADY,
HENRY W. GOODRICH,
Counsel for Petitioner.

B. H. TYRREL, Printer, 74 Maiden Lane, N. Y.

U. S. Supreme Court.

In the Matter of the Petition of JOHN H. STARIN, owner of the Steamtug "TITAN," and the Steamboat "THOMAS HUNT," their Engines, etc., for a Writ of Certiorari to the U. S. Circuit Court of Appeals for the Second Circuit, in the action of MARION E. LEGG *et al.*, Administrators of WILLIAM E. LEGG, deceased, and others,

vs.

The Steamtug "TITAN" and the Steamboat "THOMAS HUNT," their Engines, &c., JOHN H. STARIN, Claimant.

Brief for Petitioners in support of the Application for a Writ of Certiorari.

Statement.

The steamtug *Unit*, a small and not powerful tug, was on the 19th of June, 1893, proceeding up the westerly channel between Blackwell's Island

and New York City in the strong flood tide; the tide was about six miles an hour, and the *Unit* and her fleet, consisting of the *Isle of Pines*, a schooner, deeply laden with cement, on her starboard side, and the *Ella Frances*, a schooner, also deeply laden, on her port side, was making about eight miles an hour over the land, that is, about two miles in excess of the tide. There was no one at the helm of either schooner. The steam tug *Titan* was assisting the fleet of the petitioner, which was proceeding up the easterly channel between Blackwell's Island and the Long Island shore. The fleet consisted of the steamboat *Thomas Hunt*, having in tow on her starboard side an excursion barge, the *Vanderbilt*, and on her port side another excursion barge, the *Warren*, carrying an excursion party. Ahead of the *Hunt* and on a hawser of about 30 fathoms was the steamtug *Titan*, assisting in towing the fleet. The tide in the easterly channel was slightly slower than the tide in the westerly channel. As the fleet neared the head of Blackwell's Island, the *Titan* gave a signal of one long whistle, indicating her intention to round the head of the island and proceed to the New York shore. She rounded the island about 200 feet off and when abreast of the light on the head of the island and pointed about for the New York shore, she blew a signal of one whistle to the *Unit*, which was coming up the west channel. Those in charge of the *Titan* and on the *Hunt* had seen the *Unit* a considerable distance below. The signal that was blown indicated that the *Titan* meant to hold her course and proceed to the New York shore. At the same time the *Unit* had the *Titan* on her starboard hand and was bound by the law of the situation to avoid the *Titan*. She was at that time at least 1,700 feet

away. The vessels continued on their respective courses, the *Unit* making no change whatever in her course. As they approached, the captain of the *Unit* and the captain of the *Hunt* each saw that there was danger of collision, and either in response to orders from the *Hunt*, or of his own motion, the captain of the *Titan* directed the hawser to be cast off. The *Titan* went on her way ahead and was not injured. The *Thomas Hunt* backed hard, but she could not save a collision.

If the *Unit* and her fleet had, immediately upon the interchange of whistles, ported their helms, not merely the helm of the *Unit*, but the helms of the two schooners, the *Unit's* fleet would have gone under the stern of the Starin fleet, and there would have been no collision.

POINTS.

First.—*There is no question as to the fault of the Unit.*

The District Court found her at fault, and there was no appeal to the Circuit Court of Appeals. The only questions in the case are as to the fault of the *Titan* contributing to the collision and as to the fault of the *Isle of Pines*.

Second.—*The Titan and her fleet had the right of way.*

The persons in charge of the Starin fleet were,

therefore, justified in believing that the *Unit* would take steps to avoid the Starin fleet. The starboard hand rule and the interchange of the whistles made it imperative upon the *Titan* and the *Hunt* to hold their course, unless and until some maneuver *in extremis* was necessary to avoid or lessen the collision.

Third.—*The Isle of Pines was in fault.*

It is shown by the testimony that no one was at the helm of these deeply-laden schooners, and that the *Unit* was a small tug, not able to handle her tow in the tide then prevailing. Remembering that the *Unit* was, at least 1,700 feet away when the *Titan* signalled, if there had been some one at the helms of each of the schooners, a hard-a-port wheel would have changed the heading of the schooners sufficiently to enable them to pass under the stern of the *Hunt* and over towards the Blackwell's Island shore. Under these circumstances certainly the *Isle of Pines* was so far in fault as to make it proper that the Court should have divided the damages as to her. This point was urged upon the Circuit Court of Appeals, but in the opinion (a copy of which is attached to the petition), no reference is made to it, and the petitioner respectfully submits the following considerations, which were addressed to the Court below:

"There is also fault on the part of the *Isle of Pines*, which should prevent her owner from re-

covering in this action and should lead to a division of damages, if any is to be made, between the *Unit* and the libellant: that fault was the lack of a helmsman.

"The character and power of the *Unit* have been discussed above. It is undeniable that she was not able to handle the two heavily laden schooners in such a tide. It was clearly the duty of the Master of the *Isle of Pines* to be at his helm. If both schooners and the tug had ported their helms at the time of the signal from the *Titan* they could have gone under the stern of the *Hunt's* barges. It is clear there was ample room, for the collision happened nearly midway between the end of Blackwell's Island and the New York shore.

"Furthermore, the *Hunt*, which had been going only about two or three miles before the collision, stopped and backed and was going astern at the moment of the collision (fol. 460). Yet with these influences tending to put the place of collision to the eastward, the vessels came together bow to bow; if all three in the *Unit* fleet had promptly ported their helms at the signal from the *Titan*, there is no doubt that they would have gone under the *Hunt's* stern, she holding her course. There is some evidence also that the *Isle of Pines* sheered towards the New York shore (542).

"The Master of the *Hunt* expected such a maneuver from the *Unit*. At fol. 482, *et seq.*, he says:

"That at the time of the exchange of signals there was no danger of collision.

"'Q. How soon after that was there—did you first see danger of a collision? A. Probably a minute or more.

" 'Q. (*By the Court.*) When you told me right there—you say at the time the signals were exchanged you didn't think there was any danger of collision? A. Had the other fleet been handled properly there was no danger.

" 'Q. What did you expect to do and what did you expect the other fleet to do? A. We intended to cross and expected her to do the same thing, and to pass under our stern.

" 'Q. You think that there was time for the *Unit* to go under the stern? A. Under the stern of our fleet.'

" *Terrell*, pilot of the *Hunt*, says (550):

" 'Q. In your opinion, was there time or not when the first signals were exchanged between the *Titan* and the *Unit* for the *Unit* to have gone under the stern of the fleet? A. Yes, sir.'

" In the case of the *Jonty Jenks*, 54 F. R., 1021, Judge Coxe held a canal boat at fault for the absence of her helmsman from the tiller. It is true that in that case there were express instructions to him to be present, and he was told that the boat could not be maneuvered without his assistance. In the case at bar there were no such instructions given, but we respectfully submit that the rule of law is, that a vessel in tow is bound to use care to avoid collision. It is a gross lack of care to have no helmsman in charge.

" There is, of course, no question of the duty of a vessel towed upon a hawser to be properly steered. See *The Margaret* (S. D. Mich.), 2 Fed. Rep., 255; *The Margaret* (E. D., Wis.), 5 Biss., 353; *The Margaret* (U. S. Sup. Ct.), the last-named case on appeal, 94 U. S., 494. In the last case the Court said, at p. 496: 'It was the duty of the brig to

follow her guidance, to keep as far as possible in her wake, and to conform to her directions. The exercise of reasonable skill and care within this sphere was incumbent on the tow.' "

Fourth.—*Since the Unit could have avoided a collision, it was the duty as well as the privilege of the Titan and the fleet to hold their course.*

The petitioner respectfully submits that the opinion of the Circuit Court of Appeals is in error in not considering the distance apart of the vessels at the time of the interchange of the signal whistles. A reference to the portion of the chart annexed to the petition will show the situation of the vessels. The District Court found that the vessel was certainly not below Eighty-first street. The witnesses on behalf of the *Hunt* testify that she was about abreast of Seventy-ninth street. But conclusive proof of the position of the *Unit*, better than all estimates as to the interval which elapsed between the whistles, is furnished by the place of collision, which is shown to be a little to the eastward of the middle of the channel between Blackwell's Island and the New York shore.

If a line be drawn from the head of the island to Flood Rock, and the *Titan* be put upon this line headed a little up the river, the correct position of the *Titan* at the time of the signal whistle to the *Unit* will be found. Astern of her, on a hawser 180 feet long, are the *Hunt* and her barges. The bow, therefore, of the *Hunt* was about 180 feet to the

westward of the line mentioned. Taking the point of collision at a point 400 feet from the tower towards the New York shore, which was the distance off the light that the collision took place, according to an average of all the evidence, and remembering that the *Hunt* and *Titan* were swept up the river by the flood tide in the east channel, and that the *Hunt* stopped and backed and was going astern at the collision, it will be found that the *Hunt* and her two barges travelled a distance of at least 580 feet. She was making about two or three miles through the water, and the flood tide was in such a direction that it impeded rather than assisted her speed after she got beyond the point of the island. Remembering that the *Unit* was proceeding about eight or nine miles, with the tide and her own engines, it will be seen that she had to travel about three times as far to the place of collision as the *Hunt*. She must, therefore, have travelled nearly 1,700 feet from the time of the signal whistle of the *Titan* to the collision. Laying off this distance on the chart makes the vessel about opposite Seventy-ninth street at the time of the exchange of the whistles.

Under these circumstances, with ample time to the *Unit* to avoid the *Hunt* and her fleet, it was clearly the duty of the *Hunt* to hold her course, both under the privilege of the situation and of the rules, and she and her fleet, therefore, cannot be blamed for the collision which resulted.

Your petitioner hands to the Court the brief used in his behalf in the Circuit Court of Appeals.

Your petitioner respectfully submits that the Court below was in error in not giving sufficient weight to the considerations here advanced.

JOHN A. DEADY,
HENRY W. GOODRICH,
Advocates for Petitioner.

Office Supreme Court U. S.
FILED,
APR 22 1897
JAMES H. McKENNEY,
CLERK

No. 790 October Term, 1896.

IN THE

Supreme Court of the United States.

The National Machine Company,

vs.

Wheeler & Wilson Manufacturing Co.

PETITION OF THE NATIONAL MACHINE COMPANY FOR WRIT OF *CERTIORARI.*

EDWIN H. BROWN,
For Petitioner.

LIVINGSTON MIDDLEDITCH CO.,
65-67 DUANE ST., N. Y.

1

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

Ex parte THE NATIONAL MACHINE COMPANY, petitioner. } Original, No.

Petition for writ of certiorari, requiring the Circuit Court of Appeals fer the Second 2 **Circuit to certify to the Supreme Court for its review and determination, the case of The National Machine Company *v.* Wheeler & Wilson Manufacturing Company.**

To the Honorable the Supreme Court of the United States:

The petition of the National Machine Company respectfully shows to this Honorable Court, as follows: 3

FIRST.—That your petitioner, being the sole owner of the Letters Patent of the United States, No. 447,791, granted March 10, 1891, for an improvement in machines for sewing and cutting button holes, and of all the rights secured by the same, brought suit in the Circuit Court of the United States for the District of Connecticut against Wheeler & Wilson Manufacturing Company for infringement of claims 1, 2, 4, 5, 7, 15, 21, 22 and 28 of said Letters Patent. Upon final hearing his Honor Judge William K. Townsend, 4 holding the U. S. Circuit Court, on or about the 29th day of April, 1895, sustained the complaint as to claims 21 and 22, but found non-infringement of the other claims sued on, whereupon, and on the 25th day of January, 1896, a decree for an injunction and an account of profits and damages was duly entered against defendant.

5

SECOND.—Both the said defendant and your petitioner were thereafter allowed by the said Circuit Court, appeals from this decree to the United States Circuit Court of Appeals for the Second Circuit, and it was ordered by the Court that a certified transcript of the record be forthwith transmitted to the said United States Circuit Court of Appeals.

6

THIRD.—The case came on to be heard in the said Circuit Court of Appeals on the 4th day of November, 1896, before Circuit Judges, the Hon. William J. Wallace, Hon. E. Henry Lacombe and Hon. Nathaniel Shipman, and on the 23d day of February, 1897, the said Court filed an opinion dismissing the bill of complaint upon the ground that none of the claims had been infringed. Thereafter a mandate in accordance with said opinion was sent to, and filed in, the said Circuit Court. When the motion
7 was made for said mandate, your petitioner applied for a stay, in order to delay the mandate until your Petitioner might apply to this court for a writ of certiorari, but the court denied the application, stating that issuing the mandate would not interfere with a petition to this court.

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished, and hereto annexed, as part of this application, in conformity with Rule 37 of this Honorable Court,
8 relative to cases from Circuit Court of Appeals, and the same is marked "Exhibit A."

FOURTH.—Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be

certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress, entitled, "An Act to Establish Circuit Court of Appeals, and to Define and Regulate in Certain cases, the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891, the said case being made final in said Circuit Court of Appeals by the said Act. 9

10

FIFTH.—The ground upon which the said Circuit Court of Appeals dismissed the complaint was that when the claims in issue were properly construed, they had not been infringed. Although the Circuit Court had found infringement only of claims 21 and 22, the validity of all claims had been conceded by defendant and sustained by said Court, and said Court further held that the prior art led away from rather than towards the patented improvement.

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SIXTH.—Defendant contended that the prior art limited the patent in suit, and that there were further limitations by reason of an alleged prior use by Tebbetts & Doggett, who were assignors of defendant, and inventors of features in defendant's machine, an alleged prior use by Frederick Egge. The Circuit Court held that the allegations as to the two prior uses, were not sustained by the evidence. Indeed, the Circuit Court held that none of the devices of the prior patents detracted from the invention of the patent in suit, that some of the old machines were failures, that others worked imperfectly, and that those which gave the best results "were constructed and operated upon principles which led away from rather than towards the fundamental invention of the patent in suit." The Circuit Court of Appeals upon this branch of the case 12

held: "In most of his (Judge Townsend's) conclusions as to the prior art, the invention of Osterhout and the relative dates of other inventions we concur," and failed to point out any matter in which it did not concur with the opinion of the lower Court, unless it were where it said: "But the use of a finger or trip on the feed wheel to start other mechanism was old in the art." The only device of this description in evidence was in another art; it was also in a combination for laying and securing a cord around a buttonhole, where it released a spring actuated mechanism, just as a trigger releases the hammer of a fire-arm, and hence it was in a combination foreign to all the claims, because it did not operate to engage a cutter or other part with a depressor.

SEVENTH.—The construction of claims 21 and 22, essential to this finding, and which was expressly stated by the said Circuit Court of Appeals to be the reason for its finding, was predicated upon the following facts: The improvement in suit, as already stated, was embodied in machines for sewing and cutting buttonholes and it consisted in mechanism for *automatically* operating the cutter. It comprised generally (1) a cutter bar normally elevated and idle, (2) a depressor normally inoperative, (3) connections between the cutter bar and depressor, (4) a controller causing the engagement of the depressor and cutter bar through the connections.

In the peculiar construction of the machine shown in the patent, and also in the construction of defendant's machine, there were two distinct movements of certain parts: a rotary movement and a "jogging movement." The "jogging movement," as well as the rotary movement was necessary in both machines for the purpose of presenting the work to the needle. One of the parts having the "jogging movement" and

rotary movement in each machine was a rotary feed disk. In each machine the controller was attached to this rotary feed disk. 17

In the machine of the patent in suit (excepting only in the construction shown in Fig. 23, and in the dotted lines of Fig. 7), the "jogging movement" was necessary to cause the engagement of the depressor and cutter bar. In Fig. 23, and as illustrated by dotted lines in Fig. 7, the part called the controller had no "jogging movement," but other parts (not referred to as comprised in the controller) had a "jogging movement," and these were necessary to the engagement of the cutter with the depressor. 18

It was not considered by the Circuit Court of Appeals that claims twenty-one and twenty-two, *by their terms* included this "jogging movement" as an element of their combinations. As stated by said Court referring to claim twenty-one, "the controller is described as 'a cam * * rotating in unison with the * * disk.' The language does not specifically include the 'jogging' motion." But the Court, nevertheless, 19 construed the said claim, and also claim twenty-two to contain this "jogging movement" as an element of their combinations for the reason that "without making use of this lateral movement, "or jog," the subcombination of claims twenty-one and twenty-two * * * would remain inoperative; if it were inoperative, it would be without utility, and therefore unpatentable."

As in defendant's machine, the controller was not dependent on the "jogging movement" for effecting 20 engagement of the cutter with the depressor, but fulfilled its functions solely by the rotary movement of the disk; the Court found that it was not an infringement of these two claims, notwithstanding that such rotary movement was substantially concurrent with the "jogging movement." Claims 4, 5 and 28 may be regarded as also unlimited to the jogging movement.

21

EIGHTH.—By reason of decisions of this Honorable Court, followed by numerous decisions of the Circuit Courts, it has become a well established rule that a patent may contain claims for sub-combinations, comprising fewer elements than the whole number of elements which make up the operative machine, and that it is of no consequence if these fewer elements in themselves are inoperative, provided they would become operative when in combination with other
22 known devices. Were the law otherwise, as has been said by this Honorable Court, the infringer might take the most important part of a new invention, and by changing the method of adapting it to the machine to which it is an improvement, avoid the charge of infringment.

NINTH.—The defendant herein has combined the ele-
23 ments of claims twenty-one and twenty-two, so that the "jogging movement" is not necessary for causing the engagement of the depressor and cutter bar, but the engagement of the cutter bar is effected by a substantially concurrent rotary movement of the rotary feed device, the result being the same. It will thus be seen that unless the rule laid down by this Honorable Court shall be followed, complainant will receive practically no protection, for the reason that the main invention may be appropriated, when adapted in a slightly
24 different manner. Moreover, it has always been the custom in the Patent Office, to allow claims for sub-combinations, such as claims twenty-one and twenty-two, and there are comparatively few patents now in existence which do not contain such claims. All these patents would be rendered practically valueless if the Court should hold that such claims are invalid.

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TENTH.—The said Circuit Court of Appeals is in conflict with the decisions of this Honorable Court by reason of having failed to give effect to decisions in two interferences between the parties to this suit.

ELEVENTH.—Complainant, as assignee of one Osterhout, and defendants, as assignee of the joint inventors Tebbetts and Doggett, prosecuted the applications of 26
these parties, and succeeded in overcoming the same patents which have been introduced in this suit for the purpose of showing the prior art, saving and excepting only the Ostrom patent 303,453, which is irrelevant, because it is in a remote art.

TWELFTH.—The Patent Office then finding that the two applications included a generic invention 27
which was independent of specific details of construction, declared two interferences. In conformity to the regular practice, the Patent Office then framed issues which were intended to cover the generic invention common to both applications. These issues were necessarily to be interpreted in the light of both applications; in other words, they were not for the specific details of either application, but for the features common to both. Upon no other basis could there have been an interference, because the claims made specific, 28
or construed to be limited to the machine of either application, would not have covered that of the other application. To put the matter in other words, if no generic issue had been framed, and instead of such an issue one made specific for either machine alone had been adopted, the applications would have been independent instead of interfering applications.

29 THIRTEENTH.—Neither party objected to the issues as framed by the Patent Office to cover the generic invention common to both applications, although this might have been done, under established Patent Office practice, by a motion to dissolve upon the ground that there was no generic invention common to the two applications, or upon the ground that in view of the prior art no claims of breadth corresponding to the interference issues could be made in either application, or upon the ground that the issues could not be adopted as claims by Osterhout, complainant's assignor, in case he should prevail on the question of priority.

30

FOURTEENTH.—The issues framed by the Patent Office were textually the same as claims made by defendants in the Tebbetts and Doggett application, and the same as the 21st and 22nd claims of the patent in suit.

31

FIFTEENTH.—A decision of priority having been made in favor of complainant's assignor, Osterhout, and defendant having made no effort to review that decision either by appeal or by filing a bill in Equity, the decision of priority was settled so as that it was open to review in a suit such as the present, if at all, only upon a showing of manifest error. As already shown, the Circuit Court, after examining evidence adduced upon the same issue of priority between Osterhout and Tebbetts and Doggett, and another issue of priority between Osterhout and Egge, held that there was no reason for disturbing the decision of the Patent Office. The said Circuit Court of Appeals concurred in this conclusion.

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SIXTEENTH.—Notwithstanding all these facts, the said Circuit Court of Appeals, while purporting to sustain the decision of the Patent Office, nullified it by holding that the issues framed by the Patent Office to cover the generic invention and awarded under the decision of priority to complainant, should properly be construed to be limited to specific details of construction found only in the Osterhout machine. This amounted to a decision that there never was any interference, and not only that the Patent Office was wrong, 34
but that the defendant was wrong in acquiescing in such decision by acts in the Patent Office and by failing to take appeal or file a bill in equity for review. If this were the law a Patent Office decision adjudging priority in an interference would be of no value. To adopt the view that claims copied from interference issues may be construed for something not in the interference, because not common to both applications, is to destroy the effect of the Patent Office decision upon priority and to leave the matter entirely open for 35
contest in the Courts as though nothing had ever previously been done. A Patent Office decision as to priority would be mere mockery.

SEVENTEENTH.—It has been settled by this Honorable Court that an element of mechanism not included by the terms of a claim, cannot be imported by construction. The law in this respect was ignored by said Cir- 36
cuit Court of Appeals. The patentability of the subject matter of the patent in suit was explicitly conceded by the defendant so that it was not an open question for the said Circuit Court of Appeals to pass upon. Only the construction of the said claims was therefore before the Court. As the Court held that neither a controller nor a starter having a jogging movement was by the terms of either claim 21 or 22

an element, it could not under the law as well settled by this Honorable Court import such a starter or controller into either of said claims.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of, and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled the National Machine Company against Wheeler & Wilson Manufacturing Company, to the end that the said case may be reviewed and determined by this Court, as provided in section 6 of the Act of Congress, entitled "An Act to Establish Circuit Court of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner further prays that this Honorable Court will stay proceedings in the said Circuit Court of Appeals under the mandate of the said Circuit Court of Appeals until the determination of this cause in this Honorable Court; and your petitioner will ever pray.

National Machine Company,
By Edwin H. Brown
Solicitors & of Counsel for Petitioner.

STATE OF NEW YORK,
City and County of New York, } ss.:

Edwin N. Brown of the

being duly sworn, deposes and says that he is the Solicitors for the above petitioner. That he has read the foregoing petition, and knows the contents thereof, and that the facts set forth in the above petition are true to the best of his knowledge and belief.

Edwin N. Brown

Subscribed and sworn to before me this 7 day of April, 1897.

W. Laird Goldsborough
Notary Public (No. 36)
New York Co.

(L.S.)

Brief.

Introductory Explanation of Complainants' and Defendant's Machines.

As stated by Circuit Court of Appeals, machines for "stitching button-holes are of two kinds: Either "the "cloth feeds forward lengthwise of the button-hole, "without any sidewise to and fro motion, and the "needle is itself jogged sidewise to and fro after each "stitch, or else the needle reciprocates vertically with-"out any lateral motion, and the clamp which feeds "the work is given the jogging motion, so that the "needle will stitch alternately 'edge' and 'depth'"

All machines shown in the patent in suit are of the latter kind, and so is defendant's machine.

In a machine of this kind there occurs between each depth stitch and the succeeding edge stitch a jog of the work clamp, and of the feed wheel or disk connected therewith and besides a rotary movement of the feed wheel or disk for producing a feed movement of the work clamp. The jogging movement is as essential to defendant's machine as to the machines shown in complainant's patent.

Osterhout was the inventor of the improvement of the patent in suit. Tebbetts and Doggett invented whatever was patentable in defendant's machine.

Each of these inventions comprises:

(1.) A cutter normally idle or inert and periodically operated.

(2) A cutter bar arranged adjacent to the needle bar and having the cutter affixed to it.

(3) A depressor normally inoperative, but periodically operating with the needle bar to drive the cutter positively and unyieldingly through the work.

(4) Connections providing for engaging the cutter bar and depressor.

(5) A controller causing the engagement of the depressor and cutter bar through the connections. As generally illustrated in the patent and as used in the Tebbetts & Doggett (defendant's) machine, the controller is a part carried by the rotary feed wheel. For a single stroke cutter the face of the controller, as illustrated in the patent in suit, is so short as to effect only one engagement of depressor and cutter bar during the stitching of an entire buttonhole. For a multiple stroke cutter there will be a prolongation of the face of the controller sufficiently to cause a number of engagements suitable for the length of any buttonhole.

Defendant calls the Tebbetts & Doggett controller a starter, hoping in that way to distinguish it from Osterhout's controller; but no distinction can be thus made, for the latter merely has the function of starting the cutting, and a clutch terminates the cutting. Osterhout's controller is as truly a mere starter as is defendant's. Defendant has even gone so far as to call the Tebbetts & Doggett controller a " releaser," and even a " trip." There is, however, no warrant for the use of these terms, because no self-contained power is stored up in defendant's cutter mechanism. There is nothing to be released ; but, as in Osterhout's improvement, an engagement has to be made of the cutter bar with the depressor in order to effect a cut.

(6.) Defendant's, Tebbetts and Doggett's machine, as well as Osterhout's, has a hook or clutch with an inclined face, designated in Osterhout's patent (Rec., p. 485, line 115), as a clutch, which determines the period of engagement between the depressor and cutter bar. The arrangement of the clutch on Tebbetts and Doggett's needle bar shaft, instead of on the needle bar is immaterial.

Tebbetts & Doggett's added feature, consisting of a snail cam, may be an independently patentable improvement. This cam does not determine the period of any one engagement. It may prevent a second accidental engagement. At most, it constitutes a mere inversion of parts, for, whereas in Osterhout's cutter mechanism the controller moves out of the way of the lever with which it co-acts so as to terminate the operation of the cutter, defendant moves the lever (consisting of an upright tubular shaft and finger) out of the way of the controller.

(7.) Each machine has a spring for disengaging the depressor and cutter bar, when the clutch permits.

In each of these two machines it is necessary to time the descent of the cutter with reference to an edge stitch of the needle, and hence with reference to the jog and that rotation of the feed wheel or disk occurring, between each depth stitch and the following edge stitch. Obviously, this jog, or the rotary movement, which is substantially concurrent, may with equal effect be utilized for the timing of the cutter.

Granting every contention made on behalf of defendant as to the operation of the machine which Osterhout invented, he timed the descent of the cutter in proper relation to the edge stitch by means of the jog of the feed wheel or disk and the rotary movement. Tebbetts and Doggett did not depend upon this jog of the feed wheel or disk, but utilized the rotary feed movement for this purpose. The difference is so slight that it can only be discerned upon a close examination of the machines. Considering merely the result, there is no difference.

No other difference has been considered material in this suit.

So far as the movements of the cloth clamp, the needle and the cutter, including the timing of the latter, are concerned, both machines operate identically alike. There has been no contention that either machine is

superior to the other, except that the Tebbetts and Doggett machine is more certain and reliable in action. Even this contention was disproved, the first machines embodying the Tebbetts and Doggett invention being as liable to accidental cutting as any made in accordance with the drawings of the Osterhout patent.

The Interferences in the Patent Office.

For the Osterhout and the Tebbetts and Doggett improvements patent applications were in due course filed by complainant and defendant. Both applications were many times rejected, and upon reference to various patents; all the patents relied upon by the defendant in this suit, excepting only Ostrom's patent 303,453, having been cited. The latter being for a cording attachment, and hence in remote art, besides showing a combination of parts incapable of adoption for a cutter, was not cited. In this suit it is immaterial, Potts *v.* Creager (155 U. S., 597).

The applications were prosecuted by complainant and defendant until the Patent Office Examiner was convinced that a patentable invention had been made over the subject matter of all the prior patents.

Various interferences were then declared between the Osterhout and the Tebbetts and Doggett applications. In two of them the issues were framed like the 21st and 22nd claims of the patent in suit, and copied from claims then pending in the Tebbetts and Doggett application. Defendant in prosecuting Tebbetts and Doggett's application had made these claims, and therefore had asserted that they covered Tebbetts and Doggett's machine. The declaration of the interference amounted to an affirmance of that assertion and to a decision that they might properly be made in either application, because applicable equally to Osterhout's machine. Nothing less would warrant the declaration. It could not have been made to determine which of two differing machines was made first. The determination of that question was of no interest to any one,

nor could it proceed under the U. S. Rev'd Stats. Only can an interference be declared for determining who may monopolize a generic invention found equally in the applications of two or more parties. It was open to defendant to move for a dissolution of the interference upon the ground, (1) that the Osterhout and the Tebbetts and Doggett machines were not substantially the same, or (2) that the issues framed would not be applicable as claims in the Osterhout application, or (3) that in view of the prior patents there was no generic invention in the features found in both the machines of Osterhout's and Tebbetts and Doggett's applications. No better attorneys for Patent Office work than those employed by defendant could have been obtained. They realized the possibilities of moving for a dissolution of the interferences, because in one of the cognate interferences such a motion was made. By making such a motion in one interference, and not making it in the interferences relating to this suit, defendant emphasized its acquiescence in the decision of the Patent Office (involved in the declaration of the interferences) that the Osterhout and the Tebbetts and Doggett machines were substantially the same, that there was a single generic invention embodied in both of them, and that upon either machine might be based claims corresponding to the issues in the interference, namely, claims 21 and 22 of the patent in suit.

After the filing of preliminary statements by both parties, and many extensions of time to enable defendant to take testimony on behalf of Tebbetts and Doggett, a default was deliberately made, and judgment of priority awarded to complainant upon the Osterhout application. What was the scope of the judgment for complainant? Certainly, not merely that Osterhout had invented his *specific* machine before Tebbetts and Doggett invented their *specific* machine, for we have seen that no such issue was involved in the interferences, nor was it in any sense material in the interfer-

ences, or even open to discussion. As the only question in the interferences was, who first invented the *generic* invention which was independent of specific details of mechanism the judgment was as to priority in making that *generic* invention, and it was only that. There was no other judgment, nor could there have been any other judgment. To sustain that judgment it must be upheld as rendered and in its full scope. It will not be followed except it be given that scope. To give it any other meaning is to annihilate it. Therefore, to construe the 21st and 22nd claims of the patent in suit as covering anything else than the generic invention, will be to ignore, not to sustain, the interference judgment.

Granting that an interference decision is not conclusive upon the question of patentability, but only as to priority, it nevertheless must be given the scope which it had as a judgment. To give it less to ignore it as a judgment. How can it be recognized as a judgment of priority, without considering it with respect to priority of *that invention*, which was the subject of the interference?

As the Circuit Court of Appeals did not give effect to the Patent Office judgment, as a judgment of priority upon *the generic invention which alone formed the subject of the interferences*, the said Court did not follow it, but overruled and ignored it entirely.

Can the judgment of the Patent Office legally be ignored? The law is well settled, that unless the defeated party to an interference, takes some proceedings for a review of the proceedings, the judgment becomes conclusive forever, and cannot be attacked collaterally in a suit for infringement based upon a patent granted to the successful party. In all the decisions cited in this suit, to show that Patent Office decisions may be overruled, the complaints were based upon some provision of the Statutes enacted, for the purpose of enabling the defeated party to have a Pat-

ent Office judgment reviewed, principally upon Section 4915. *Morgan* v. *Daniels*, 153 U. S., 1-1; *Christie* v. *Seybold*, 6 U. S. App., 520. Hill v. Wooster 132 U.S. 693

The decision of the Patent Office was that Osterhout was a prior inventor of the improvement contained in the 21st and 22d claims, which were the subject of the interference, as the terms of those claims must be construed when applied not to Osterhout's device merely, but to both Osterhout's device and that of Tebbetts & Doggett. It is well settled that interference issues must be so construed.

In *Nicholson* v. *Bennett*, 16 O. G., 631 (632), the Commissioner said: "Subjects of interference are not words, but things, *and the same words must mean the same things in their application to two different devices in interference; the issue cannot have one meaning in its application to one, and a different meaning in its application to the other.*" Therefore, if the decision of the Patent Office is to be followed on the question of priority, as the Circuit Court of Appeals held it must be followed, it must be held that the improvement of which Osterhout was the inventor is that contained in the 21st and 22d claims, as the terms of such claims are construed in their application to the two different devices in interference. To hold that it meant only what those claims might mean when applied to Osterhout's device alone, would be to ignore the decision of the Patent Office on the question of priority, as well as on other questions, for this was *not* the decision of the Patent Office.

We respectfully submit that the decision of the Circuit Court of Appeals is therefore erroneous, in that it fails to recognize the judgment in the interference that Osterhout was the prior inventor of the improvement of claims 21 and 22 as such claims are construed when applied to *both* complainant's machine and defendant's machine and as the decision is in conflict with the law as settled in this Honorable Court and upon a point of great importance, inasmuch as it goes to the founda-

tion of all practice as to the effect to be given to interference judgments, we submit that this Honorable Court should grant this petition.

Under the Law an Element Cannot be Imported into a Claim.

We also submit that the decision of the Circuit Court of Appeals is erroneous, because it puts a narrow construction upon claims 21 and 22 and other claims of the same general character, for the reason that the subject matter of such claims would not be operative for causing the descent of the cutter, except for the jogging movement of the cutter controller and hence that to sustain the claims as covering patentable subject matter, it is necessary to construe the jogging movement into the claims. We submit that is contrary to the law, as settled in this Honorable Court, it being unnecessary to include in a sub-combination claim every feature essential for securing a desired result.

The latest case in this Honorable Court which we have been able to find directly on this point is *Deering* v. *Winona Harvester Works*, 155 U. S., page 286 (302). The improvement in that suit was applied to a grain harvester and consisted in a pivotal extension to a butt-adjuster for automatically adjusting the bundle of grain. Infringement was claimed of the 20th and 21st claims, and the 21st claim included specifically the pivotal extension, together with certain arms, d^2, d^3, d^4, which arms, as connected with said extension, held it always in position parallel to the platform. Without these arms the pivotal extension would be inoperative. Claim 20 was for this extension without the arms, and the defendant in that suit urged that such claim was invalid unless there was imported into it the arms which rendered it operative, and if there were imported into it such limitation, then defendant's device did not infringe. This is exactly the reasoning followed by the Circuit Court of Appeals in this case;

that is to say, it found that the 21st claim did not, by its terms, contain any "jogging movement," but that unless such "jogging movement" were imported into the claim it would be inoperative, and if such limitation were made to the claim, then defendant did not infringe. Therefore because otherwise the claim would be inoperative, the Court found it necessary to include in said claim the "jogging movement," and thus found non-infringement by defendant.

The Supreme Court, in the case just cited, however, said, page 302: "Admitting that additional elements are necessary to render the device operative, it does not necessarily follow that the omission of these elements invalidates the claim, or that the precise elements described in the patent as rendering it operative, must be read into the claim. If Steward were, in fact, the first to invent the pivotal extension to a butt-adjuster, he is entitled to a patent therefor, though the infringer may make use of other means than those employed by him to operate it. *Loom Co.* v. *Higgins*, 105 U. S., 580, 584. In such case, any appropriate means for making it operative will be understood. Otherwise, the infringer might take the most important part of a new invention, and by changing the method of adapting it to the machine to which it is an improvement, avoid the charge of infringement. The invention of a needle with the eye near the point is the basis of all the sewing machines used; but the methods of operating such a needle are many, and if Howe had been obliged to make his own method a part of every claim in which the needle was an element, his patent would have been practically worthless."

If the rule were otherwise, and it were necessary to cover a complete and operative combination of elements in each claim of a patent, it would be, as the Supreme Court said, utterly impossible to obtain sufficient protection, for "the infringer might take the most important part of a new invention, and by changing the

method of adapting it to the machine to which it is an improvement, avoid the charge of infringement." In this case; the "jogging movement" was only necessary to the operativeness of the device, because of the manner in which it was adapted to the machine, and was involved in separate claims.

These decisions of the Supreme Court have been uniformly followed by the Circuit Court.

Roberts v. *H. P. Nail Co.*, 53 F. R., 916, 920.
H. W. Johns Mfg. Co. v. *Robertson*, 60 F. R., 900, 905.
Chambers Co. v. *Faries*, 64 F. R., 587, 588.

It is well settled by this Honorable Court that there cannot be read into a claim an element not present for the purpose of making out a case of novelty or infringement.

McCarthy v. *Lehigh Co.*, 160 U. S., 110-116.

We also submit that the decision of the Circuit Court of Appeals is erroneous, according to decisions of this Honorable Court, in holding that in the art to which the Osterhout patent in suit relates, there was a starter analagous to Osterhout's, the fact being that the only starter at all analagous was found in the cording attachmeut of Ostrom's patent 303,453, which was in a different art, and that starter was in a combination utterly incapable of use for effecting the operation of a button-hole cutter, as elaborately pointed out in the complainant's brief previously filed in this Court.

Potts v. *Creuger*, *ante.*

We also submit that the decision of the Circuit Court of Appeals is erroneous in holding as to figures 7 and 23 of the patent in suit, that the controllers of such figures operate with a jogging movement, because the parts of the machine, which in the specification are termed "controllers," had absolutely no jogging movement, and the jogging movement pointed out by

this Court was in a part not called a controller, and hence, not the controller of the claims in suit.

It is respectfully submitted that the writ of *certiorari* should be issued in this case as prayed for.

EDWIN H. BROWN.

Office Supreme Court, U. S.
FILED
APR24 1897
JAMES H. McKENNEY
Clerk

166-122

No. 790 OCTOBER TERM, 1896.

IN THE

Supreme Court of the United States

THE NATIONAL MACHINE COMPANY

vs.

WHEELER & WILSON MANUFACTURING CO.

Brief of Wheeler & Wilson Manufacturing Co. in Reply to Petition of the National Machine Company for Writ of Certiorari.

LIVINGSTON GIFFORD,
JAMES H. LANGE,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

THE NATIONAL MACHINE COMPANY, Complainant, vs. WHEELER & WILSON MANUFACTURING COMPANY, Defendant.	October Term, 1896.

IN RE PETITION OF THE NATIONAL MACHINE COMPANY, COMPLAINANT, FOR WRIT OF CERTIORARI.

Brief on Behalf of Wheeler & Wilson Manufacturing Company in Opposition.

To the Honorable, The Supreme Court of the United States:

This Controversy lacks that "General Importance" essential to Certiorari.

I. Complainant's petition is demurrable for that it neither shows nor alleges that this controversy involves questions of "gravity and general importance" or "weighty and serious matters" which this Court has laid down as an essential pre-requisite that must be established before this Court will consider the merits of the decision of the Circuit Court of Appeals.

In re Woods, 143 U. S., 206.
Amer. Const. Co. vs. Jacksonville Railway, 148 U. S., 383.
In re Chetwood, 165 U. S., 443, 462.
Lau Ow Bew, 141 U. S., 583; 144 U. S., 47.

II. This case does not involve any question of excess of jurisdiction, public international law, gravity, general importance, or as to weighty or serious matters. It is an ordinary everyday patent case. The patent is for a cutter attachment to a buttonhole sewing machine, which is not a machine of general or very extensive use, because it is only used for manufacturing and not for household purposes; and even in manufacturing it is only one variety among several kinds of cutter attachments used for the same purpose and appearing among the patents and machines exhibited in this case. In nine years, the total sale of these machines by the Wheeler & Wilson Company in this country has not exceeded 5,000. The extent of use of these machines, and therefore the amount of public concern involved in this controversy, is insignificantly small in comparison with the extent of use of machines involved in patent and trade-mark litigations in which this Court has uniformly denied applications for *certiorari*, among which may be mentioned the following:

Incandescent Lamp Patent—Sawyer-Mann vs. Edison, 149 U. S., 785; 53 Fed. Rep., 592.

Cultivator Patent—David Bradley Co., vs. Eagle Mfg. Co., 154 U. S., 500; 57 Fed. Rep., 980.

Sewing Machine Patent—Singer vs. Brill, 154 U. S., 517; 54 Fed. Rep., 380.

Rug Patent—Stewart vs. Smith, 154 U. S., 518; 58 Fed. Rep., 580.

Syrup of Figs Trade-mark—California Co., vs. Putnam, 163 U. S., 678; 69 Fed. Rep., 740.

Handle Cutter Patent—Caverly vs. Deere, 163 U. S., 679; 66 Fed. Rep., 305.

Trolley Railroad Patent—Elmira Co. vs. Thomson-Houston, 163 U. S., 685; 71 Fed. Rep., 396.

Street Car Patent—Hammond vs. Stockton, 163 U. S., 689; 70 Fed. Rep., 716.

Cash Carrier Patent—Martin Co., vs. Martin, 163 U. S., 694; 67 Fed. Rep., 786.

Fly Paper Patent—Andrews vs. Thum, 173 U. S., 676 ; 67 Fed. Rep., 911.
Sulky Plow Patent—Starling vs. Wier Co., 163 U. S., 705 ; 53 Fed. Rep., 119.

III. So far as the subject matter is concerned, of course the amount of public concern involved in the monopoly of automatically cutting button holes, limited to extensive manufacture, is not to be compared with that involved in many of the subjects matter above set forth. Perhaps the most analogous was the sewing machine of Singer Co. vs. Brill ; but even that was a family sewing machine which had been sold to such an extent that they were in use by millions of families and each of these millions of families was, under the decision of the Circuit Court of Appeals, liable to a separate suit for such use.

IV. The questions that the complainant here seeks to have reviewed are of no greater gravity than those presented by the petitions denied in the above-cited cases. For example, this complainant says that, under the law, an element cannot be imported into a claim, and in Singer vs. Brill the defendant contended that, under the law, an element could not be omitted from the claim for the purpose of finding infringement, as had been done by the Circuit Court of Appeals in that case.

Again, this complainant contends that the decision of the interference works an estoppel, but in Martin Co. vs. Martin, the complainant contended that an estoppel accrued from the warranty arising from the sale of the patent, which estopped the infringer from limiting the claims by the prior art to a greater extent than expressed on the face of the claims and specifications, and also that the previous sale of a machine marked " patented " estopped the seller from afterwards, as an

infringer, denying that a similar machine infringed the patent.

Many other parallels might be drawn between the questions here raised and those presented in the cases above cited which, however, will probably be so familiar to this Court as to make further comparison unnecessary.

V. If this Court should take up the present case on *certiorari*, its action would apparently constitute an authority that might be cited in the future in favor of taking up almost every patent litigation; whereas, this Court has declared that "the primary object of this Act * * * was to relieve this Court of the overburden of cases and controversies arising from the rapid growth of the country and the steady increase of litigation and for the accomplishment of this object to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals * * * and making the judgments of that Court final except in extraordinary cases" (Amer. Const. Co. vs. Jacksonville Railway, 148 U. S., 382).

This is a case of a kind which emphatically should not be taken up on *certiorari*, because the facts are so complicated and the testimony so voluminous that the facts would burden this Court far more than ordinary cases. The complication and labor involved in the argument and consideration of this case if taken up by this Court may be seen from the following extracts from the opinions below:

The Circuit Court of Appeals said:

> "The patent is long and complicated, it covers fourteen pages, contains thirty claims and is accompanied with fifty-nine drawings. The evidence is voluminous and the Judge who heard the cause in the Circuit Court has elaborately discussed the patent the defendant's machine and the prior state of the art."

The Circuit Court said :

> Page 1286 : " The record in this very complicated case has the refreshing merit of the exclusion of irrelevant matter and inclusion of all necessary evidence. The questions at issue have been exhaustively presented in admirable briefs and by lucid and thorough oral argument."

VI. There is no such diversity of opinion between the Judges below as might indicate the necessity of review.

In the Circuit Court of Appeals the case was heard by a full bench of three Circuit Judges and the opinion was unanimous.

The opinion of the Circuit Court was the same as the opinion of the Circuit Court of Appeals so far as any question of law is concerned. The difference in their conclusions as to infringement of claims 21 and 22 arose, not from a difference as to the law, but solely from a mistake as to a fact made by the Circuit Court and corrected by the Circuit Court of Appeals after being admitted by complainant on the argument in the Circuit Court of Appeals. This will be further explained in this brief later on.

The Supreme Court will certainly not take a case up for the purpose of reconsidering a question of fact as to which the decision of the Circuit Court of Appeals is founded upon the admission of the complainant on argument, and it would be very strange if it should take up a case of this kind for the purpose of considering any question of law upon which the Circuit Court of Appeals and Circuit Court were unanimous throughout.

Osterhout Was Not a Pioneer.

The invention of the patent in suit relates to automatic cutting mechanism for buttonhole sewing machines.

Osterhout, the inventor and patentee, was not a pioneer in the art.

Buttonhole sewing machines embodying automatic cutters for cutting a buttonhole slit were old in the art, and were divided into three classes:

(a) Machines which employ a vibrating or jogging needle, and in which the cloth clamp which holds the material has no vibrating or jogging movement.

(b) Machines in which the cloth clamp vibrates or jogs, and in which the needle has simply a vertical movement.

(c) Machines containing two needles.

The invention of the patent in suit, instead of being pioneer in the art, relates simply to the second of the above three classes and employs a new *form* of cutter mechanism for producing an old result.

> "Buttonhole machines of the class in question [to which the patented invention belongs] comprise a stitch forming mechanism, a work moving mechanism, and a cutting mechanism."
>
> Page 1288, Opinion Circuit Court.

> "In the stitch-forming mechanism of this class of machines, the needle does not move over the cloth, but reciprocates constantly in one position, while the work-moving mechanism imparts to the fabric a jogging movement for each stitch, and a progressive feed movement, whereby the cloth is so moved as to produce the required buttonhole."
>
> Pages 1290, 1291, Opinion Circuit Court.

> "In patent No. 240,546, granted April 26, 1881, to John Reece, for an automatic buttonhole stitching and cutting machine, a cutter-actuating cam on the feed wheel, acting upon the cutter lever, caused the depresser of the cutter to cut the fabric and thereafter permitted its release. This device was combined with the sewing machine having two needles, one to make the edge stitch and the

other the depth stitch, so that there was no jogging movement therein, and it furnished no suggestion for adaptation to machines having such movement."

Pages 1293, 1294, Opinion Circuit Court.

"Patent No. 337,273, granted March 2, 1886, to J. W. Lufkin, shows a cutter in which an arm, operating upon the cutter lever every second time that the needle descends, causes it to cut the buttonhole during the operation of the stitching, but only at the time when the needle is making the edge stitch."

Page 1294, Opinion Circuit Court.

"These machines do not anticipate the combination of the patent in suit. They show that there existed, in the prior art of buttonhole stitching machines, hand and automatically operating cutting attachments, and that fingers similar to that of the patent in suit, for starting the various operations at a definite time, were well known, and that controlling devices limited in adaptability and scope had been constructed. They served to illustrate the problem then presented in the art; namely, in a machine imparting a jogging motion to the work, how to connect a finger on a feed wheel with a cutter bar so that at a predetermined time the cutter bar would be automatically thrown into such position that, upon actuation of a depresser, the cutter bar would descend and cut a buttonhole slit, and would thereafter be automatically prevented from continuing such cutting operation."

Pages 1294, 1295, Opinion Circuit Court.

"In Patent No. 301,974, granted July 15, 1884, to Arthur Felber, the cutter carrier is mounted upon the needle carrier and connected therewith by a spring which acts as a depressor. The cutter carrier moves up and down with the needle. The needle has a jogging movement relatively to the cloth. When the needle descends at a certain portion of the stitching operation to make an edge stitch, the spring-actuated cutter descends with it and cuts the cloth. When it jogs to make the

depth stitch, a projection on the cutter strikes upon an intercepting jaw which holds the cutter out of contact with the goods and prevents it from cutting."

Page 1295, Opinion Circuit Court.

"This machine [Felber's] is arranged to operate automatically with relation to the jogging movement, and is in a limited sense controlled, as argued by counsel for defendant, by a cutter-controller or intercepter and provided with a depressor."

Page 1295, Opinion Circuit Court.

"The machine of the Egge patent, therefore, is so differentiated from that of the patent in suit, that at most if it be prior in conception and reduction to practice, it can only affect the claim of the patent in suit as a pioneer patent."

Page 1297, Opinion Circuit Court.

"The machines that make these stitches operate in one of two ways. Either the cloth feeds forward lengthwise of the buttonhole, without any sidewise to and fro motion, and the needle is itself jogged sidewise to or fro after each stitch, or else the needle reciprocates vertically without any lateral motion, and the clamp which holds the work is given a jogging motion so that the needle will stitch alternately 'edge and depth.' The patent in suit is concerned with this latter class of machines."

Page 1327, Opinion of Circuit Court of Appeals.

"It will not be necessary here to go over all the ground so carefully covered; in most of his [Judge TOWNSEND'S] conclusions as to the prior art the invention of Osterhout and the relative dates of other inventions we concur."

Page 1330, Opinion Circuit Court of Appeals.

"The defendant concedes that invention was exercised on the part of Osterhout in his solution of the problem how to connect a cutter mechanism with the feed wheel so that it would be auto-

matically operated during a portion only of the stitching period, and so operated as to cut when making the edge stitch, and not to cut when making the depth stitch, in a buttonhole sewing machine of the type in which the cloth clamp has a jogging movement to make the edge and depth stitch and a cycle of feed movement to lay the stitches about the buttonhole. The complainant has also, upon the argument, made concessions as to his utilization of the jogging movement to effect this result."

Page 1330, Opinion Circuit Court of Appeals.

The patentee in this patent says, page 2, line 131, to page 3, line 18, as follows:

> " To cause the cutter-carrier to be engaged with the needle-carrier and depressed by it to cut the work at one descent of the needle-carrier, and to be not engaged with the needle-carrier, nor thus depressed by it, at its next descent, or to cause the cutter-carrier to be engaged with the needle-carrier, and depressed by it, to cut the work only when the work-carrier is at one end only of its momentary to-and-fro movement, I suitably connect the clutch for temporarily engaging the cutter-carrier with the needle-carrier with a suitable part of the mechanism of the sewing machine, such as the part B, C, D, F, G, H, or H^1, which has a movement in one direction at one elevation of the needle-carrier, or at the momentary movement of the work-carrier in one lateral direction, and which has a movement in the opposite direction at the next elevation of the needle-carrier, or at the next lateral momentary movement of the work-carrier, in the reverse direction."

It is apparent from the foregoing portions of the opinions of the Circuit Court and the Circuit Court of Appeals, that no claim can be made on behalf of complainant that the invention of the patent in suit, included in the claims charged to have been infringed, is of pioneer character; on the contrary, while it was conceded by the defendant in both Courts that the subject matter of the claims is patentable, and while the

Court so found, yet aside from the mistake in fact of the Circuit Court as to the subject matter of claims 21 and 22, both of the lower Courts agree that the invention of the patent in suit is of limited, and not of pioneer, character, and pertained to one of two subclasses of the general class of buttonhole sewing and cutting machines.

At the outset, then, this Honorable Court, in considering the question of granting the petition of complainant for a writ of *certiorari*, has not to deal with a patent for a pioneer invention.

Jogging Motion Essential to the Operation of the Osterhout Invention whether at the Start under Claims 21 and 22, or at the Termination, under the Other Seven Claims in Suit.

Aside from the fact that both the lower Courts were unanimous in finding as a matter of fact that the invention of the claims in suit of the Osterhout patent is not pioneer, but is limited to a particular sub-class of the general class of automatic buttonhole sewing and cutting machines, they were also unanimous that as to seven of the nine claims in suit the jogging movement is essential to the operation of the Osterhout invention as applied to such sub-class of machines; and if the decision of the Circuit Court of Appeals is correct in stating that the jogging movement is essential to the operation of the Osterhout controller viewed simply as a starter, or as a device to bring about an engagement between the cutter and its depressor, then the decision of both Courts should have been harmonious, in fact, as to claims 21 and 22 (as they were in law as applied to the facts as each Court understood them under claims 21 and 22); and that the decision of the Circuit Court as to the facts under claims 21 and 22 was erroneous, and that the decision of the Circuit Court of Appeals as to the facts under claims 21 and 22 is cor-

rect, is amply supported by the admission of the complainant at the argument of the case before the Circuit Court of Appeals, and by the admission of the complainant in its petition to this honorable Court.

> "The complainant has also upon the argument made concessions as to his utilization of the jogging movement to effect this result," [to connect a cutter mechanism with the feed wheel so that it would be automatically operated during a portion only of the stitching period, and so operated as to cut when making the edge stitch and not to cut when making the depth stitch in a buttonhole sewing machine of the type in which the cloth clamp has a jogging movement to make the edge and depth stitch and a cycle of feed movement to lay the stitches about the buttonhole.]
>
> Page 1330, Opinion Circuit Court of Appeals.

"All this may be eliminated from this opinion in view of complainant's concessions upon the argument. In the primary form of machine, if the work clamp is jogged out, the rotary feed disk may be revolved indefinitely, and the finger or controller P will not come into engagement with the lever which starts connection between cutter and depressor. The jogging movement is essential to bring it into such engagement; engagement and consequent starting is impossible until the work clamp jogs in carrying the feed disk and finger P with it. This the complainant now concedes. In the form shown in Fig. 7, dotted line, the controller jogs, and this jog of the controller is necessary to bring it into position for operating upon the adjacent lever by which the cutter bar is shifted into engagement with the depressor. After the cutting has been done, the jogging movement of the controller moves it away from the lever, so that it may pass by the lever. This, too, the complainant now concedes. In the form shown in figure 23 the controller itself has no jogging motion, but the mechanism which affects the connection with the cutter carrier is more complex than in the other forms. The fact is that the projecting finger P shifts the part g^2 into position to be operated upon by a projection g^3 on the lever

H, which has a jogging movement, and that the jogging movement of this lever completes the movement of the cutter carrier necessary for engaging the latter with the depressor. The jogging of this lever in the other direction permits the cutter carrier to be released by the depressor. This, also, is now conceded by the complainant. Here the controller is really a compound one, to whose efficient action jogging motion is essential. * * *

"The above concessions, which cover the starting of the cutter in each form of machine, are sufficient; certainly, it is essential to an automatic cutting device embodied in a sewing machine that it shall at least begin to cut; that function is quite as important as it is that it should cease cutting at some appropriate time. In view of these concessions, it is a sound contention of defendant that Osterhout, so far as this record shows, 'never invented any cutter mechanism except one having a controller, the fulfillment of whose function necessarily depended upon the jogging movement of some part of the work-moving mechanism; that he never illustrated or described any other cutter mechanism, and that he, therefore, failed to show how any cutter mechanism could be operated otherwise than through the jogging of some part of the work-moving mechanism.'"

Page 1332-3, Opinion Circuit Court of Appeals.

"In the machine of the patent, therefore, the jogging motion is essential to both engagement and disengagement."

Page 1335, Opinion Circuit Court of Appeals.

"In the machine of the patent in suit (excepting only in the construction shown in Fig. 23 and in the dotted lines of Fig. 7) the 'jogging movement' was necessary to cause the engagement of the depressor and cutter bar. In Fig. 23, and as illustrated by dotted lines in Fig. 7, the part called the controller had no 'jogging movement,' but other parts (not referred to as comprised in the controller) had a 'jogging movement,' and these were

necessary to the engagement of the cutter with the depressor."

Page 5, Complainant's Petition for Writ of *Certiorari.*

Hence, from the concessions of complainant, not only at the argument before the Circuit Court of Appeals but also in its petition to this Honorable Court for writ of *certiorari*, it appears, aside from the finding of fact by the Circuit Court of Appeals, that the Circuit Court was in error in point of fact as to the Osterhout invention under claims 21 and 22, in its statement that engagement of the cutter with the depressor could be effected in the Osterhout invention by mere rotation of the Osterhout controller or device mounted on the feed wheel, indeqendent of the jogging movement, in some of the modifications of mechanism shown and described in the Osterhout Patent.

Under this condition of affairs it is believed that, if the Circuit Court had not been in error in its finding of fact as to the operation of the Osterhout device considered with relation to the subject matter of claims 21 and 22, it must of necessity have come to a conclusion harmonious with the conclusion and finding of the Circuit Court of Appeals and with the concessions made by complainant, and hence the decision of the Circuit Court on claims 21 and 22, as well as on the other seven claims should have been in favor of the defendant, because there is no disagreement between the two lower courts as to the law in the case applicable to the facts when these facts are clearly ascertained.

Defendant's Machine Does Not Employ the Jogging Movement in the Operation of Its Cutter Mechanism.

"By a series of operations upon the argument, counsel for defendant demonstrated that its machine did not use said jogging motion at all in connection with the action of the cutter-operating

mechanism, and only used the rotary motion to start the cutter device by a pin, and did not depend upon any contact surface to determine the cutting operation.

Page 1300, Opinion Circuit Court.

"The only question then remaining in the case is whether defendant's machine infringes. Defendant starts engagement by means of a projecting finger on the rotary feed disk which engages with a finger on the connecting lever which is mounted on a tubular rock shaft, and which moves the cutter bar into proper position to begin to cut; but the use of a finger or trip on the feed wheel to start other mechanism was old in the art. * * * In the machine of the patent, therefore, the jogging motion is essential to both engagement and disengagement. In defendant's machine, however, it is utilized for neither. As the Circuit Court found, defendant has 'demonstrated that its machine did not use jogging motion at all in connection with the action of the cutter-operating mechanism, and only used the rotary motion to start the cutter device by a pin, and did not depend on any contact surface to determine the cutting operation.'"

Page 1334, Opinion Circuit Court of Appeals.

From the outset of the litigation in this cause defendant has relied upon the law as expressed by this Honorable Court in Railway Company vs. Sayles, 97 U. S., 554, October Term, 1878.

"At the time when the complainant alleges that Thompson and Bachelder completed the invention for which the letters patent on which the suit is brought were granted—namely, in 1846 and 1847—double trucks under railroad cars had come into general use in the country, and it was a desideratum to have a brake, or system of brakes, which could be operated from either end of the car, upon the wheels of both trucks, and a number of inventors were in the field, contriving and testing their various devices. Like almost all other inventions, that of double brakes came when, in the progress of mechanical improvement, it was

needed; and, being sought by many minds, it is not wonderful that it was developed in different and independent forms, all original, and yet all bearing a somewhat general resemblance to each other. In such cases, if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance toward the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs. These general principles are so obvious that they need no argument or illustration to support them. We think they are specially applicable to the case before us."

Under that doctrine, and in view of the nature of the invention of the patent in suit, the prior art and the defendant's machine, this defendant prevailed in the Circuit Court as to seven of the nine claims, and should have prevailed as to claims 21 and 22 except for the error in fact made by the Circuit Court in its opinion as to the subject matter of said claims; and, upon the admissions of complainant, and the findings of fact by the Circuit Court of Appeals, defendant has ultimately prevailed as to all the claims in suit under the doctrine of the case referred to.

Upon the law there is no want of harmony between the decision of the Circuit Court and that of the Circuit Court of Appeals.

In view of the error in fact by the Circuit Court, as admitted by complainant at the argument before the Circuit Court of Appeals, the case comes to this Court as if the decisions of both of the lower Courts were harmonious in every respect.

Nevertheless the complainant applies to this Honorable Court for the grant of a writ of *certiorari* and in its petition charges the decision of the Circuit Court of Appeals with error in three particulars, namely:

1. The Court erred in finding "the use of a finger or trip on the feed wheel to start other mechanism was old in the art."

2. The Court erred in construing claims 21 and 22 to include a jogging movement by necessary implication.

3. The Court erred in refusing to apply the doctrine of *res adjudicata* on the questions of patentability, construction of claims 21 and 22 and infringement thereof by defendant, because of a defaulted interference in the Patent Office between complainant's assignor and defendant's assignor, in which the issues in the interference were textually the same as claims 21 and 22 of the patent in suit.

First Alleged Error.

Did the Court err in finding "the use of a finger or trip on the feed wheel to start other mechanism was old in the art?"

Complainant's petition says very little concerning this charge of error in the decision of the Circuit Court of Appeals. All the petition says in the matter is as follows:

> (P. 4:) "The only device of this description in evidence was in another art; it was also in a combination for laying and securing a cord around a buttonhole, where it releases a spring-actuated mechanism, just as a trigger releases the hammer of a fire-arm, and hence it was in a combination foreign to all the claims, because it did not operate to engage a cutter or other part with a depressor."

On this branch, which concerns a question of fact only, the Circuit Court said:

> (Rec., p. 1293:) "Prior to the invention of the patent in suit, fingers or projections on the feed

> wheel had been used to bring some independent or auxiliary device into operation at a predetermined point. Thus, in Patent No. 303,453, granted to F. W. Ostrom August 12, 1884 [for improvement in buttonhole sewing machines], a pin on the feed wheel released certain cording mechanism so that it was operated by a spring, and also released certain brake mechanism. This device did not cut, while it set a train of mechanism in motion it did not throw it out of operation. In Patent No. 240,546, granted April 26, 1881, to John Reece for an automatic buttonhole stitching and cutting mechanism, a cutter actuating cam on the feed wheel, acting upon the cutter lever, caused the depressor of the cutter to cut the fabric and thereafter permitted its release. This device was combined with a sewing machine having two needles, one to make the edge stitch and the other the depth stitch, so that there was no jogging movement therein, and it furnished no suggestion for adaptation to machines having such movement."
>
> (Rec., p. 1294:) "These machines do not anticipate the combination of the patent in suit. They show that there existed in the prior art of buttonhole-stitching machines hand and automatically operating cutting attachments, and that fingers similar to that of the patent in suit, for starting the various operations at a definite time, were well known, and that controlling devices limited in adaptability and scope had been constructed."

The Circuit Court of Appeals, in its decision concerning this matter, said:

> "Defendant starts engagement by means of a projecting finger on the rotary feed disk, which engages with a finger on the connecting lever, which is mounted on a tubular rock shaft and which moves the cutter bar into proper position to begin to cut; but the use of a finger or trip on the feed wheel to start other mechanism was old in the art."

Since complainant, in its petition to this Court, charges that the finger or trip referred to in the decision of the Circuit Court of Appeals belongs to an art

foreign to the art of buttonhole sewing machines to which the invention of the patent in suit pertains, we also quote from defendant's brief before the Circuit Court of Apppeals a chapter relating to the automatic starters in the prior art.

The Automatic Starters Shown in the Prior Art.

Since Judge TOWNSEND has treated the mode of operation after the start as immaterial to claims 21 and 22, it becomes important to review the machines in the prior art to show that the start of the cut was automatically brought about and located by a connection between the knife mechanism and the feeding mechanism.

1. In the Egge 1885 buttonhole sewing and cutting machine complainant's expert Quimby admits (pp. 456-7, Cross-Ints. 71, 72) that the start of the cut was automatically brought about and located by the "trip O," which is fixed on the feed bar. The motion of the "trip O" producing the start was the feed movement, and not a jogging movement.

2. In the Felber Patent for buttonhole sewing and cutting machine, Quimby admits (p. 404) that the start, as well as the termination, of the cut was automatically located by what the Felber Patent refers to as jaws "E, E^1," and "plate *a*," which are fixed to the cloth clamp.

3. In the Reece Patent 240,546 for a buttonhole sewing and cutting machine, Quimby admits that the cut was automatically started and located by what the Reece Patent calls (p. 5, line 61) "a cam, *x* (see fig. 2), on the disk *j*," which is the feed disk; the movement producing the start being the feed movement, and not a jogging movement.

4. In the Lufkin Patent 337,273 (for a buttonhole sewing and cutting machine), Quimby admits (p. 405) that the cut was automatically brought about on every alternate stitch by what the Lufkin Patent refers to by saying that "the machinery is so arranged and timed that the cutting lever will follow the needle down with every second downward movement of the latter, the arm D operating upon the cutting lever every second time it descends."

5. In the Ostrom Patent 303,453 (for a buttonhole sewing machine), Quimby admits that the cording operation was automatically started and located by what the Ostrom Patent refers to (line 61, p. 40) as "the pin 31, or other suitable pin." This pin is fixed to the feed wheel, and operates by the feed movement, and not by a jogging movement.

6. Quimby does not deny that in the Ostrom Patent 303,453 the stop-motion operation was automatically started and located by what the Ostrom Patent refers to (line 80, p. 3) as "a pin 31, which, at about the completion of a buttonhole, as described, strikes against," etc. This pin 31 is also fixed to the feed wheel, and operates by the feed movement, and not by a jogging movement.

7. It is surely not necessary to go into the evidence of this case for the Court to have judicial knowledge of the fact that there is nothing characteristic or novel about a pin, cam or tappet mounted upon one piece of mechanism to start a second piece of mechanism in operation at a determined time in the cycle of movements of the first. All time locks, alarms or striking mechanism on clocks are started on that principle. Indeed, there is probably no machine containing an intermittently moving part that does not in one form or another embody such a starter.

It being, therefore, admittedly old to start and locate

the cut by tripping a knife mechanism with a trip fixed to the feed mechanism, we now turn to the Osterhout device to ascertain by what new mode of operation he did so, and we find that the mode of operation which distinguishes Osterhout's starting from all these was the utilization of the jogging or zigzag motion for that purpose, which in the Osterhout Patent (p. 4, line 104) is expressed as follows:

> "It may be observed that, *by the intermittent momentary to-and-fro movements* [*i. e.*, jogging movements] of the cam bearing P, and the part L connected with that bearing and with the cutter carrier I, as above described and shown in Figs. 1, 2, 3 and 7, the cutter carrier is *caused to be depressed* by the needle carrier to cut the work only at the alternate descents of the needle carrier and at only one end of the momentary to-and-fro movements of the work carrier, and only while the cam bearing is opposite the finger *e* of the part L, and that at all other times the part L is held at rest against a stop N by a spring M."

Second Alleged Error.

Did the Court err in construing claims 21 and 22 to include the jogging movement by necessary implication?

Complainant contends that the Circuit Court of Appeals erred in including the jogging movement in claims 21 and 22, because those claims by their terms do not include the jogging movement as an element.

Complainant says in its petition (p. 5):

> "It was not considered by the Circuit Court of Appeals that claims 21 and 22 by their *terms* include this 'jogging movement' as an element of their combination."

Again (p. 9):

> "As the Court held that neither a controller nor a starter having a jogging movement was by the

terms of either claim 21 or 22 an element, it could not under the law as well settled by this Honorable Court, import such a starter or controller into either of said claims."

Doubtless complainant refers to the following language of the opinion :

> " Without making use of this lateral movemen, or jog, the subcombination of claims 21 and 22t and, indeed, the combination of each of the claims, would remain inoperative ; if it were inoperative it would be without utility and therefore unpatentable. The claims in question, therefore, can only be sustained by reading into them the jogging motion without which the combination set forth in the claims will perform no function " (p. 1334).

There are two answers to complainant's position :

1. The above language even if taken broadly, dissociated from the context in the opinion, is in accordance with the law of the Supreme Court.

2. The above language is taken much more broadly by the complainant than was necessary for the decision of the case or is warranted by the context of the opinion.

1. The most recent decision of the Supreme Court upon the subject of reading an element into a claim to prove that it is an operative device, is in McCarty vs. Lehigh Valley R. R. Co., 160 U. S., 116, as follows :

> " There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are so described in the specification and exhibited in the drawings. It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which the device is used, and proving that it is an operative device, we know of no principle of law which would

> authorize us to read into a claim an element which is not present for the purpose of making out a case of novelty or infringement."

The Circuit Court of Appeals in the language above quoted has simply followed the principle of the McCarty case, by reading into claims 21 and 22 the jogging motion "with a view of showing the connection in which the device is used, and proving that it is an operative device."

If the jogging movement be not considered an element of claims 21 and 22 these claims do not present the ordinary subcombination. Let us disregard, for the moment, the language of those claims, "whereby the cutter is thrown into action" and suppose them to cover, without regard to result, the subcombination, still they present an extraordinary state of affairs which could hardly be found in any other subcombination. Without the jogging motion, the two parts of the subdivision would not have any operative relation with each other whatsoever, whether useful or useless, because the Circuit Court of Appeals has held as a matter of fact, conceded by complainant, that without the jogging movement they would not even make contact with each other. Thus the opinion says:

> "In the primary form of machine, if the work clamp is jogged out, the rotary feed wheel may be revolved indefinitely and the finger or controller P will not come into engagement with the lever which starts connection between cutter and depressor. The jogging movement is essential to bring it into such engagement; engagement and consequent starting is impossible until the work clamp jogs in carrying the feed disk and finger P with it. This the complainant now concedes" (p. 1332).

The most the complainant contends for as the law is that a combination of elements may be specified, each of which operates upon the other, but the whole of which is merely a subcombination that cannot perform any useful result without additional mechanism. But

that is not this case, because here the collection of elements specified do not operate upon each other without the jogging movement. So far as the subcombination goes, the elements must operatively connect with each other, and if the means of connection is not expressed, it must be inferred.

2. But when properly understood, the opinion of the Circuit Court of Appeals does not necessarily mean broadly that an inoperative subcombination may not be claimed. That broad question did not arise in this case, and by explaining the question which did arise and taking up the discussion in the opinion of the Circuit Court of Appeals, from first to last, this will be very clear.

Claims 21 and 22 are not broadly for a combination irrespective of what function it will perform. Both of them express the function. Claim 21, after setting forth the combination, says, "whereby the cutter is thrown into action." Claim 22 says, "whereby the latter is thrown into action to operate the cutter."

It was contended by defendant that in the complainant's machine the combination could not perform this function expressed in the claims without the jogging motion, and that, aside from the question as to whether the claims might have expressed a subcombination dissociated entirely from its function, it is certainly a well-established principle of law that where a claim, after setting forth the combination, expressly states the function or result to be accomplished thereby, it makes all of the elements necessary for accomplishing that result or function essential to the claim, and, if they are not all expressed, they must be read into the claim. Defendant insisted that the combination expressed in claim 21 was inoperative with respect to the function "whereby the cutter is thrown into action" without the jogging motion. The Circuit Court held against the defendant on this question of fact. On the argument before the Circuit Court of Appeals, however, complainant's counsel were forced to admit this fact,

and the Circuit Court of Appeals so held. All these things appear in the decision of the Circuit Court of Appeals as follows:

> "The case has been much simplified here by concessions made upon the argument. The defendant concedes that invention was exercised on the part of Osterhout in his solution of the problem how to connect a cutter mechanism with the feed wheel so that it would be automatically operated during a portion only of the stitching period, and so operated as to cut when making the edge stitch and not to cut when making the depth stitch in a button-hole sewing machine of the type in which the cloth clamp has a jogging movement to make the edge and depth stitch and a cycle of movement to lay the stitches about the button-hole. The complainant has also, upon the argument, made concessions as to his utilization of the jogging movement to effect this result, which will be referred to in more detail after stating the conclusion arrived at in the Circuit Court in the following quotations" (p. 1330).

In the quotations from the opinions of the Circuit Court the following constructions of claims 21 and 22 are given:

> "Claims 21 and 22, however, cover the finger device used as a starter and nothing more. * * * Claims 21 and 22 * * * cover broadly a construction actuated by a cam or device rotating in unison with the clamp, operating cam or disk for throwing the depressor into action" (p. 1331).

After quoting from the opinion of the Circuit Court, the Circuit Court of Appeals continues:

> "It is manifest that the Circuit Court was of the opinion that claims 21 and 22 covered a sub-combination of the general combination covered by the other claims, and that complainant's specifications disclosed the embodiment of such sub-combination which would be operative as a starter without the co operation of any jogging movement" (p. 1331).

Evidently accepting the construction of the Circuit Court that claims 21 and 22 claimed the combination broadly for throwing the cutter or depressor into action; or, in other words, as a starter and nothing more, the Circuit Court of Appeals proceeds to determine whether the Circuit Court was correct in supposing that the function thus expressed in the claims would be operatively accomplished without the cooperation of any jogging motion, and after examining each form of construction in the Osterhout Patent, they came to the conclusion that the Circuit Court was wrong, and that as to each form complainant has been forced to admit that the jogging motion is essential to starting, as follows:

> "In the primary form of machine if the work clamp is jogged out, the rotary feed disk may be revolved indefinitely and the finger or controller P will not come into engagement with the lever which starts connection between cutter and depressor. The jogging movement is essential to bring it into such engagement; engagement and consequent starting is impossible until the work clamp jogs in carrying the feed disk and finger P with it. This the complainant now concedes. In the form shown in figure 7, dotted line, the controller jogs, and this jog of the controller is necessary to bring it into position for operating upon the adjacent lever by which the cutter bar is shifted into engagement with the depressor. After the cutting has been done, the jogging movement of the controller moves it away from the lever, so that it may pass by the lever. This, too, the complainant now concedes. In the form shown in figure 23, the controller itself has no jogging motion, but the mechanism which affects the connection with the cutter carrier is more complex than in the other forms. The fact is that the projecting finger P shifts the part g^2 into position to be operated upon by a projection g^3 on the lever H which has a jogging movement, and that the jogging movement of this lever completes the movement of the cutter carrier necessary for engaging the latter with the depressor. The jogging of this lever in the other

direction permits the cutter carrier to be released by the depressor. This also is now conceded by the complainant. Here the controller is really a compound one, to whose efficient action jogging motion is essential. As to the general form of Osterhout's machine, as shown in figure 2; complainant also concedes that the jogging movement would be necessary for disengaging the parts if a multiple cutter were used; but insists that this would not be so when a single stroke cutter is employed. It is unnecessary, so far as claims 21 and 22 are concerned, to review the facts or the arguments by which the defendant controverts this last proposition. The above concessions, which cover the starting of the cutter in each form of machine, are sufficient; certainly it is essential to an automatic cutting device embodied in a sewing machine that it shall at least begin to cut, that function is quite as important as it is that it should cease cutting at some appropriate time. In view of these concessions it is a sound contention of defendants that Osterhout, so far as this record shows, 'never invented any cutter mechanism except one having a controller, the fulfillment of whose function necessarily depended upon the jogging movement of some part of the work-moving mechanism; that he never illustrated or described any other cutter mechanism, and that he therefore failed to show how any cutter mechanism could be operated otherwise than through the jogging of some part in the work-moving mechanism'" (pp. 1332-3).

Later on, the opinion says:

"In the machine of the patent, therefore, the jogging motion is essential to both engagement and disengagement. In defendant's machine, however, it is utilized for neither" (p. 1335).

Later on still, it states:

"And, as already pointed out, we do not think claims 21 and 22 can be differentiated on any theory that they cover the finger only as a starter operating solely by a rotary feed motion, since the

> jogging motion is essential to *start* complainant's cutting devices and defendant makes no use of such jogging movement even as a starter" (p. 1337).

And later on still, it sets forth complainant's contention in the following words :

> "And therefore that, although it now appears that the original Tebbetts & Doggett claims, now claims 21 and 22, correctly cover defendant's machine, but do not cover complainant's unless an unexpressed element is read into them, defendant cannot now avail of that fact to limit these two claims of the patent" (p. 1338).

All of these quotations show that there was established in the mind of the Circuit Court of Appeals three propositions of fact : (1) that claims 21 and 22 expressed the combination as a starter ; (2) that as a starter every form of construction in the Osterhout Patent operated by the jogging movement ; (3) that the only manner in which Osterhout invented a solution of the problem presented by the art was by the jogging motion.

With these points in mind, the Circuit Court of Appeals used the language upon which complainant relies, and which we requote as follows :

> "Without making use of this lateral movement or jog, the sub-combination of claims 21 and 22 and, indeed, the combination of each of the claims, would remain inoperative ; if it were inoperative it would be without utility, and therefore unpatentable" (p. 1334).

What this language means is that it would remain inoperative for the function or result expressed in the claim and solved by Osterhout's invention when compared with the prior state of the art, to wit, the result or function of starting ; or, as expressed in the claim, "whereby the cutter is thrown into action," being the meaning attributed to claims 21 and 22 by the Circuit

Court and adopted by the Circuit Court of Appeals when they quoted from the Circuit Court: "Claims 21 and 22, however, cover the finger device used as a starter and nothing more."

As opposed to complainant's contention the decision of this Honorable Court in Deering vs. Winona Harvester Works, 155 U. S., 286-302, is controlling.

In the case at bar the Circuit Court of Appeals while stating that claims 21 and 22 do not expressly, by their language, include a jogging cam or device, or include a jogging movement, yet, in view of complainant's patent and the record before the Court, it held the claims must be construed to include a jogging cam or device, or starter.

In Deering vs. Winona Harvester Works, claim 20 of the Steward Patent (see pp. 296, 297) reads as follows:

> "20. The combination, in a grain binder, of moving butt adjusting mechanism, and the board d^1, substantially as described."

This claim does not by its language expressly state a *pivoted* board d^1. On the contrary, it is perfectly clear from its language that it is broad enough to include a pivoted board, or a rigid board, but this Court had no difficulty in saying that the claim must be construed to include only a pivoted board, or, in other words, "a board pivoted to the butt-adjuster" (p. 302).

By comparison the two cases are parallel.

The Court of Appeals in the case at bar said in effect that claims 21 and 22 include a jogging starter to effect an engagement between the cutter and its depressor, or, in the language of claim 21, "whereby the cutter is thrown into action."

In Deering vs. Winona Harvester Works, this Honorable Court said that the board d^1 of claim 20 of the Steward Patent must be construed to mean "A board pivoted to the butt-adjuster," although, as is apparent upon the face of claim 21, its language did not call for a board pivoted to the butt-adjuster.

Further, complainant relies upon Deering vs. Winona Harvester Works as authority in support of its contention that the Court of Appeals erred in including in claims 21 and 22 the jogging movement to provide an operative combination, and doubtless complainant will rely upon the following portion of the opinion of the Court in that case :

> "Admitting that additional elements are necessary to render the device operative, it does not necessarily follow that the omission of these elements invalidates the claim, or that the precise elements described in the patent as rendering it inoperative must be read into the claim."

On the other hand, it is submitted that this language of the Court, when properly understood in the light of the facts of that case, is in support of the decision of the Court of Appeals in the case at bar.

In the case at bar the elements forming the combination in each of claims 21 and 22 were supposed by complainant to effect or perform the function specified in each of the claims. The Court of Appeals found, as matter of fact and upon the admissions of complainant's counsel, that the cam or device in the claims must have a *jogging* movement as well as a *rotary* movement to bring about an engagement between the cutter and its depressor, or to start the cutter into action.

This is a totally different situation from that presented under claim 20 in the Deering vs. Winona Harvester Works. There the claim as construed claimed as *new* merely a board pivoted to a butt-adjuster irrespective of the connections.

This Court stated that, if Steward was the *first* to provide the butt-adjuster with a pivoted board, he was entitled to claim these two elements in combination irrespective of the means for connecting the board with the adjuster, whereby the latter might be operated with relation to the butts of grain.

But the Court also stated that the board must be a *pivoted* board.

As we understand the decision of this Court in the case referred to, claim 20 of the Steward Patent was dealt with as if it had read as follows :

> The combination, in a grain binder, of moving butt-adjusting mechanism, a board, as d^1, pivoted to the butt adjuster, and connections between said butt-adjusting mechanism and board to operate substantially as described.

Under such a claim, Steward being the first to provide a moving butt adjuster with a pivoted board, clearly he should not be limited to the particular connections shown and described in his patent, but he could include any connections whereby the pivoted board was operative with relation to its butt adjuster.

The decision is, it is submitted, to that effect, and nothing more.

Now, parallel with such case, the Court of Appeals said in effect in the case at bar that the " cam or device " of claims 21 and 22 must be a *jogging* cam or device, whatever the form of connections between it and the cutter depressor, and the case at bar would be the same if, for instance, in claim 21 the cam was so described and the " connections between the said rotating cam or device and depressor " were eliminated from the claim so that said claim read as follows :

> 21. In a machine for stitching buttonholes, the combination, with a stitch-forming mechanism, a work clamp, and mechanism for operating the latter, of a cutter, a cutter carrier or bar, a depressor operated by the needle-bar actuating mechanism, a jogging cam or device rotating in unison with the clamp-operating cam or disk whereby the cutter is thrown into action.

Manifestly, on the face of such a claim connections between the cam or device and depressor must be inferred, and if, as stated in Deering vs. Winona Harvester Works, Osterhout were in fact the first to invent the subject matter of claim 21, the absence from the

claim of the connections between the cam or device and depressor would not invalidate the claim, for the connections would be understood ; and, on the other hand, being so understood, Osterhout would not be limited to his particular connecting means, but the claim would be good as covering with the depressor and jogging cam or device any equivalent form of connection whereby the cam or device would be connected with the depressor to provide an operative combination.

Under these conditions the case of Deering vs. Winona Harvester Works is no more authority for complainant's contention, that he is not limited to the jogging cam or starter than under claim 20 of the Steward Patent it could be contended that Steward was not limited to the pivoted board, because in the one case the pivoted board was the essence of the invention and in the other case the jogging cam or starter is the fundamental element which it is impossible for Osterhout to eliminate from his invention.

As to the necessity and importance in the patent in suit of the jogging movement, the Circuit Court of Appeals in its decision says :

> " If that engagement is left to be broken only by the forward movement of the finger P moving rotarily with the feed wheel, there would be two descents of the needle and cutter, since after each forward movement and before the next one, there are always two jog movements. And one of these descents would take place when the work was not in proper position, and the cloth would be cut somewhere on the line of stitches. In complainant's machine it is the jog-out which saves this catastrophe. The same jog which puts the work in wrong position for cutting, invariably puts the projecting finger in such position that the engagement with the lever which sets or keeps the cutter in action becomes impossible. In the machine of the patent, therefore, the jogging motion is essential to both engagement and disengagement " (p. 1335).

And further:

> "In view of these concessions, it is a sound contention of defendant that Osterhout, so far as this record shows, 'never invented any cutter mechanism except one having a controller, the fulfillment of whose function necessarily depended upon the jogging movement of some part of the work-moving mechanism; that he never illustrated or described any other cutter mechanism, and that he therefore, failed to show how any cutter mechanism could be operated otherwise than through the jogging of some part in the work-moving mechanism'" (p. 1333).

To further show that the decision of the Circuit Court of Appeals is founded directly upon the decisions of the Supreme Court, so far as this question of law is concerned, we now quote from the defendant's brief before the Circuit Court of Appeals, the chapter relating to this question:

Jogging Motion at the Start must by Implication be Read into Claims 21 and 22.

(1) *McCarthy vs. R. R. Co.*, 160 U. S. 116, holds that a "feature may be read into the claims * * * with a view of showing the connection in which a device is used, and proving that it is an *operative device*."

(1) Judge TOWNSEND correctly applied the above principle to the construction of all claims excepting 21 and 22. He did not extend it to 21 and 22 because he erred as to the operation, and erroneously held that "the effect of the *rotary* movement is to effect the engagement of the controller with the cutter," and that the described construction is "not necessarily limited to a construction dependent upon the combined rotary and jogging motion for causing a depression," and that "the original application described and illustrated a construction whereby the cutter might be put in engagement *independently* of the jogging motion."

(3) We have shown that in the Osterhout operation the "cam or device" and "connections" of claim 21 and 22 are not an "operative device" unless they jog as well as rotate when the cutter is being "thrown into action" and unless they are properly constructed and proportioned with respect to extent of jog.

(4) The language of claims 21 and 22, viewed in the light of the specification and drawings of the Osterhout Patent, is such that under the law the claims are limited to substantially the described construction and mode of operation of the cam or device and connections whereby the specified result is accomplished, because both claims specify a "cam or device rotating in unison with the clamp-operating cam or disk, and connections between such rotating cam or device and depressor," and add, in substance, the words "whereby the cutter is thrown into action."

(5) If it should be determined that the language of claims 21 and 22, interpreted by the drawings and specifications of the Osterhout Patent, does not in terms include a "cam or device" having a *combined* or *concurrent* jogging and rotary motion to perform its function as a starter, then, we submit, as matter of law, by necessary implication the combined jogging and rotary motion must be read into the claims so as to provide, under the Osterhout invention, an operative combination to effect the depression of the cutter.

Hartshorn vs. Barrel Co., 119 U. S., 664, 677.

In this case the complainant's patent was for a shade roller, and the principal claim in suit was as follows:

> "1. The arm or detent *k* arranged upon the roller in such a manner that it moves toward and away from the centre or axis of the roller *a* by the action of gravity and centrifugal force, substantially as described."

This arm or detent *k* was a gravity pawl fixed on the roller, and engaging a ratchet on a fixed bracket independent of the roller. In the defendant's contrivance the pawl and ratchet were both upon one end of the roller. The Court, in declaring non-infringement, decided that the gravity pawl of complainant's patent served no useful purpose except in connection with the fixed ratchet, independent of the roller, and, by necessary implication, in order to provide an operative combination, the fixed ratchet on the journal box or bracket was to be read into the claim, and, so read, the defendants did not infringe.

The Court on this branch of the case say :

> " It is to be observed that in these claims nothing is said about the combination of the arm or detent *k* with the elevated side of the journal box, which is a distinct and separate part of the mechanism ; and yet it is perfectly obvious that it is only in combination with that separate ratchet that the arm or detent *k* performs any useful function at all. The fact that the arm or detent *k*, arranged on the roller in the manner described, moves toward and away from the centre or axis of the roller in consequence of the motion of the roller itself, is not patentable independently of any useful combination in which it performs a necessary part. Any arm or detent, pivoted at one end and loose at the other, would necessarily follow the motion of the roller, the loose end flying outwardly. The same remarks apply to the second claim of the combination and arrangement of the roller and spring, the rod, and the arm or detent at the same end of the roller. They perform no function by reason of the circumstance of their being at the same end of the roller, except in conjunction with the ratchet on the bracket, and there is no novelty in such a combination and arrangement, as the same thing was found in the original Hartshorn Patent. It follows, therefore, that in the construction of the David Patent the claims must be confined, by reference to the specification, to the use of the devices named in a shade roller, where the pawl or detent is upon the roller, moving with it, and the ratchet

or engaging part is separated by being placed upon a journal box or bracket, or other fixed part of the mechanism, and that it must also be limited to the particular form of the arm or detent described. It follows from this that the shade roller manufactured and used by the defendants is not an infringement of the David patent. In the defendants' roller the pawl and the ratchet are both upon one end of the roller, the pawl being upon the revolving part and the ratchet upon the fixed part of the roller, and the pawl and ratchet are of a different form from those covered by the David patent.

"We hold, therefore, upon this part of the case, there was no infringement."

Consolidated Roller Mill Co. vs. Walker, 138 U. S., 124, 132, 133.

"The Circuit Court further says: 'It seems to be proper for us to add that our judgment is with the defendant upon the defense of non-infringement, also. To understand the nature of the invention intended to be covered by the first claim, resort must be had to the specification, and we there find that the "swivel boxes" are essential to the contemplated greater movement at one end of the shaft than at the other, whereby is effected "the tightening of the belt or belts at one side of the machine without disturbing those at the other." This is apparent on the face of the paragraph hereinbefore quoted at length; and the expert testimony is direct and convincing that to the practical working of the described device as a belt tightener, this swiveling feature is indispensable. Without the swiveled boxes Gray would not have "independently adjustable bearings." True, those boxes are not expressly mentioned in the claim, but we think they are to be regarded as entering therein by necessary implication, for the reason just stated, as well as by force of the words 'as shown.' Moreover, the prior state of the art would limit the claim to the specific organization shown and described (*Phœnix Custer Co. vs. Spiegel*, 133 U. S., 360, 369). But that organization the defendant does not use. His alleged infringement consists in the use of a roller mill manufactured under and in accordance with Letters Patent No. 334,460, granted on January 19, 1886, to John T. Obenchain. In the defendant's machine

the journal boxes are rigidly supported, so as to be always horizontal, and incapable of any tilting or swiveling motion; and this is essential to the working of the apparatus. A continuous countershaft is not employed, but three coupled base shafts, the outer shafts or sections being each journaled at the outer end in a vertically adjustable non-swiveling box, and the inner end of each being forked and carrying a loosely pivoted ring. These two rings are connected by a tumbling rod forked at each end and pivoted to the rings, thus forming a universal coupling, and thereby, through the central shaft or tumbling rod, rotary motion is transmitted from one of the end shafts or sections to the other, no matter how much they may differ in vertical position. Now, for the reasons already given, we are of opinion that such a construction of Gray's first claim as would embrace the Obenchain device is inadmissible.' We see no reason to doubt the correctness of these views."

Elliot vs. Bonsack Machine Co., 38 U. S. App., 596, 601, 602, C. C. App. 2d Cir.

"The question remains as to the proper construction of the Emery belt patent, with the Abadie machine out of view. The Hook machine was a combined filler-forming and filler-wrapping device. Its successor was a separate filler-forming and filler-wrapping machine, and the complainants, without limiting themselves to the peculiarities of either set of devices, and, speaking in general terms, regard the claims 10 and 12 as covering any machine which forms the tobacco into a filler in one set, and subsequently wraps such formed filler into another set, provided the filler is carried from the filler-forming devices to the wrapping devices by an endless belt. This construction is broader than the invention and gives far wider scope to the belt than it deserves. The invention was the described and claimed means by which the filler was formed and delivered to the wrapping devices, and consisted as much in the means by which it was formed as the means by which it was delivered. The expansion of the invention so as to make any flat belt or ribbon, which may serve as a support

and a carrier, correspond to the curved belt, which is a part of the forming mechanism, cannot be permitted. As was said in the prior opinion: 'The Emery belt was not a mere carrier: it was continually a forming and encircling tube. An endless belt, to serve simply as a carrier, has a different character and performs a different office, from the belt of the Emerys.' The conclusion which we reached before is not changed, that 'the endless belt of the tenth and twelfth claims is curved so as to compress the tobacco and form the filler, and the filler-forming chamber is one in which the filler is moulded by the curved belt. The two claims are to be limited to the endless belt, which is curved transversely into tubular form, to constitute a mould, which compresses or moulds the tobacco into a filler, and to the filler-forming chamber which operates to bend or curve the belt into the tubular form; not merely to enable it to receive or to carry, but to enable it to form a filler by the power conveyed by it' (35 U. S. App., 436, 579)."

See, also,

Bragg vs. Fitch, 121 U. S., 478, 482–484.
Silsby vs. Foote, 14 How., 218.
Lamson Cash Ry. Co. vs. Godehard, 59 Fed. Rep., 776, 780.
Styles vs. Rice, 29 Fed. Rep., 445, 446.

Third Alleged Error.

Did the Court err in refusing to apply the doctrine of *res adjudicata* to the questions of patentability, construction of Claims 21 and 22, and of infringement thereof by defendant? This, because of the defaulted interference between complainant's assignor and defendant's assignor, in which the issues in the interference were textually the same as Claims 21 and 22 of the patent in suit.

In this matter the Circuit Court said as follows:

(Pp. 1302, 1303): "These claims were put in interference with the Tebbetts and Doggett Patent, and the applicants for the latter made default, whereupon the Patent Office awarded said claims

priorty over Tebbetts and Doggett. Counsel for complainant argues that defendant thereby conceded patentability of its invention, and that defendant's patent infringed said claims. I do not so understand the law. The object of the interference proceedings is to determine priority not patentability; and while the decision in interference proceedings may *res adjudicata* as to this question, it does not preclude defendant from raising other questions not in issue in said proceedings (Holliday vs. Pickhardt, 29 Fed., 853; Christie vs. Seybold, 6 U. S. App., 520: Electric Ry. Co. vs. Jamaica & B. R. Co., 61 Fed., 655; Reece Buttonhole Mch. Co. vs. Globe Buttonhole Mch. Co., 61 Fed., 958).

The Circuit Court of Appeals after treating of this branch of the case concluded as follows:

> "It has not been the tendency of the decisions, either of the Supreme Court or of the Circuit Courts or Courts of Appeal, to extend the effect of interference decisions as final adjudications, and we concur with the Circuit Court in the conclusion that 'while the decision in interference may be *res adjudicata* as to priority, it does not preclude defendant from raising other questions not in issue in said proceedings'" (p. 1338).

I. It is not contended that in the construction of defendant's machine any idea was stolen from Osterhout, the patentee of the complainant. On the contrary, it is admitted that defendant's machine was a wholly independent and separate invention which was built, put into use, and described in a caveat, without any knowledge of the Osterhout machine and long before the Osterhout application for a patent was filed.

Therefore, at the time that Osterhout applied for his patent, the defendant's right to continue using its machines was a property right which, under the Constitution, they could not be deprived of "without due process of law." This was a right of property entirely distinct and separate from any right of the defendant to a patent.

II. Complainant now attempts to deprive defendant of its right to use its machine without due process of law upon the theory that defendant is "precluded from contesting the validity and scope of claims 21 and 22 of the patent in suit and infringement of the claims by defendant's machine."

"The theory of this contention," says the decision of the Circuit Court of Appeals, "is that, under the rules "and practice of the Patent Office, either party has a "right to move to dissolve an interference on the ground "that in view of the state of the art the issue framed "therein could not be based upon his invention as de- "scribed and claimed. That failure to move for such "dissolution amounted to an acquiescence in the holding "of the Patent Office that the inventions of the two "parties, as limited by the prior art there shown were "identical. That they were patentable despite the prior "art; that either might properly be the basis of claims "corresponding to the interference issues. And, there- "fore, that, although it now appears that the original "Tebbetts & Doggett claims, now claims 21 and 22, cor- "rectly cover defendant's machine, but do not cover "complainant's unless an unexpressed element is read "into them, defendant cannot now avail of that fact to "limit these two claims of the patent."

Under the above theory the "due process of law" for depriving the defendant of the property right in continuing the use of its machines would resolve itself down to a motion in the Patent Office to dissolve the interference. The Patent Office rule covering such motion was as follows:

> "122. Motions to dissolve an interference upon the ground that no interference in fact exists, or that there has been such irregularity in declaring the same as will preclude a proper determination of the question of priority, or which deny the patentability of the applicant's claim, or his right to make the claim, should, if possible, be made not later than the twentieth day after the statements of the parties have been received and approved. Such motions, when in proper form, will

be transmitted by the Examiner of Interferences with the files and papers to the proper Primary Examiner for his determination. * * *

"124. * * * From a decision of the Primary Examiner affirming the patentability of the claim or the applicant's right to make the same, no appeal can be taken."

The rule allowed no opportunity to examine or cross-examine witnesses and no appeal from the Primary Examiner. This is the alleged "due process of law" by which, on complainant's theory, defendant is to be deprived of its vested rights to continue using its machine.

The question as to the patentability of claims 21 and 22 or Osterhout's "right to make the same" is something imperatively demanding testimony pro and con subject to cross-examination. It is something upon which the testimony in this case is most voluminous, and with respect to which the Court, with the aid of experts and other witnesses and a multitude of illustrative and working models, has evidently found great difficulty to unravel. It is this question which complainant now contends defendant was forced to submit to an unappealable decision of the Primary Examiner upon a mere motion, and that such a decision is *res adjudicata* with respect to defendant's right to continue using its machine.

If defendant had risked the decision of such a motion in the Patent Office, such decision, if against it, would have been final; but, if in its favor, would not have been final. Under Rule 124 appeals may be taken from decisions of the Examiner which "*deny* the patentability of applicant's claim" *deny* or "the right of an applicant to make the claim." The reason for permitting an appeal from a negative decision but not from an affirmative one, with respect to patentability or right to make the claim, is, because the policy of the Patent Office is, for the benefit of the public at large, to determine the question of priority with respect to subject matter which in the

opinion of either the Primary Examiner or the appellate tribunals in the Patent Office is a proper subject of contest.

This makes it manifest that the decision on all these motions amounts to nothing more than the faintest presumption.

III. The Revised Statutes make no provision for a trial in the Patent Office *inter partes* of anything save the single question of priority of invention. Sections 4904, 4909 and 4010 are as follows:

> "4904. Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the Primary Examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the Primary Examiner, or of the Board of Examiners-in-Chief, as the case may be, within such time, not less than twenty days, as the Commissianer shall prescribe." (see prior Patent Statutes, Section 42, 1870; Section 8, 1836; Section 9, 1793).
>
> "4909. Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners-in-chief, having once paid the fee for such appeal (see prior patent statutes, Section 46, 1870; Section 1, 1866).
>
> "4910. If such party is dissatisfied with the decision of the examiners-in-chief, he may, on payment of the fee prescribed, appeal to the Commissioner in person. (see prior patent statutes, Section 47, 1870; Section 2, 1861)."

The question of priority was the only issue tendered

to the defendant by the notice of interference, which was as follows (Record, p. 1037) :

> " Your case above referred to is adjudged to interfere with others hereinafter specified, and the question of priority will be determined in conformity with the rules."

After the decision of an interference, the judgment of the Patent Office, corresponding with the decree of a Court, is entered in the following words : " Judgment of priority of invention is hereby rendered in favor of James A. Osterhout."

There is, therefore, nothing in the statute, or in the notice of interference, or in the judgment itself, dealing with any question excepting the single question of priority of invention.

IV. When the interference was declared, and throughout all the proceedings therein, claims 21 and 22 were not in the Osterhout application. Osterhout might have inserted such claims under the following rule, but did not do so, viz.:

> " 109. When an application is involved in an interference in part, and shows and describes, without claiming, a patentable invention claimed by another party thereto, the applicant may, at any time within twenty days after the preliminary statements (referred to in Rule 110) of the parties have been received and approved, on motion duly made, as provided in Rule 153, file an amendment to his application duly claiming such invention, and on the admission of such amendment the invention shall be included in the interference." * * *

The declarations of interference involving claims 21 and 22, each specified (pp. 1033 and 1035) claim 4 as it then stood in Osterhout's application as the only claim involved. That claim was as follows (p. 1018) :

> " The combination with the stitch-forming mechanism and work carrier of a sewing machine and its mechanisms for imparting to the work car-

rier step by step progressive movement and momentary to and fro movements transverse to the progressive movement, of a work cutter, its carrier, its depressor connected to and moving with the stitch-forming mechanism, a cam connected to and moving with the mechanism for imparting progressive movement to the work carrier, and means essentially as described in operative connection with said cam and mechanism for imparting the to-and-from movements to the work carrier, to cause the engagement and disengagement of the cutter, carrier and depressor, whereby the cutter is depressed into the work when the work carrier is in a predetermined part or parts only of its progressive movement and is at one end only of its momentary to-and-fro movements, substantially as set forth."

That claim was literally and expressly limited to the utilization of the to-and-fro or jogging movement, which, the decision holds, as a matter of fact, is not present in defendant's machine. If there were any acquiescence to be implied from the failure of the defendant to make a motion, it certainly went no further than acquiescence in the right of Osterhout to make that claim 4 and not claim 21 or claim 22. If the application of Osterhout had issued, as it was during and at the end of the interference, it would have contained nothing corresponding with either claim 21 or claim 22. Those claims were inserted by Osterhout long after the *inter partes* contest had ceased and Osterhout's application had resumed its *ex parte* form. Defendant had no notice of the insertion of such claims and would have had no status to oppose their insertion because it was purely an *ex parte* proceeding. Obviously, therefore, their insertion by Osterhout cannot be taken as *res adjudicata* against defendant.

V. The meaning of a claim depends upon its context and upon the state of the art. Attached to the Tebbetts & Doggett specification, and read in connection with the defendant's machine, claims 21 and 22 may have an entirely different meaning from that when

attached to the Osterhout specification and when read in connection with the Osterhout machine. The meaning of a claim, and the question as to whether it covers a machine different from the machine described in the specification to which it is attached, are mixed questions of law and fact upon which there cannot be any binding adjudication between parties without the opportunity of examining and cross-examining witnesses. No such opportunity was presented to the defendant by any proceeding offered in the Patent Office. Nor, indeed, even on a motion could the defendant have raised the question as to whether claims 21 and 22, if attached to the Osterhout specification, would be infringed by defendant's machine. To have argued such a question on a motion in the Patent Office would have been to assume a moot case, because such claims were not attached to the Osterhout specification, and it would have been to argue a question of infringement as to which the Patent Office had absolutely nothing to do.

VI. The fact that Osterhout's application when in interference contained no claim like 21 or 22, and that the only claim of his involved in the interference was the then claim 4, above quoted, limited literally to utilizing the jogging motion, made it unnecessary for Osterhout in his preliminary statement to swear as to the date of his invention of claims 21 and 21, and there is no evidence in the file wrapper and contents that he ever did so. The form of preliminary statement prescribed in the rules of practice of the United States Patent Office at page 80 contains these words: "That he conceived the invention set forth in the declaration of intereference on or about the date of." But a foot note appended to the form states as follows:

> "If the party has doubts as to whether the matter of his application is properly involved in the issue as declared, then in lieu of the terms. 'the invention set forth in the declaration of interference,' he may say, 'the invention contained in

> the claim of my application declared to be involved in this interference,' and should specify such claims by number."

Therefore it was possible for Osterbout to obtain judgment of priority upon a preliminary statement which only claimed priority as to his then claim 4, limited to utilizing the jogging motion and without any statement pertaining to priority with respect to either claim 21 or 22.

VII. Complainant's theory in this case has been as follows:

> "The Patent Office decided—and its decision was acquiesced in by defendant—that Osterhout was the prior inventor of everything covered by the issues in the two interferences as construed not merely in connection with Osterhout's specifications and drawing, but as they may be interpreted in connection with the specification and drawings of Tebbetts & Doggett. This would be so, even though it were not necessary in rendering this decision to consider this question, because the doctrine of *res adjudicata* applies not merely to all points which are actually decided in the prior litigation, but is conclusive on all points which might properly be raised under the issues therein."

Res adjudicata is a misnomer applied to the decision of any question in the Patent Office—even the question of priority. *Res adjudicata* "puts an end to controversy." It inflexibly and absolutely closes the discussion. This is not true of a decision of the Patent Office even on priority, as was decided in this Court in Morgan vs. Daniels, 153 U. S., 125, as follows:

> "Upon principle and authority, therefore, it must be laid down as a rule that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subse-

quest suit between the same partis, unless the contrary is established by testimony which, in character and amount, carries thorough conviction."

Res adjudicata does not permit the contrary to be established by any amount of testimony. It does not permit any testimony to be taken on the point. Since, therefore, even the question of priority is not *res adjudicata*, it is evident that complainant's position above quoted is ill taken wherein he attempts to apply the principles of *res adjudicata* to the other questions which might have been raised in the Patent Office. The weight of a decision in the Patent Office is not because of *res adjudicata* but because of the weight attached by one tribunal to the decision of another tribunal on the points involved in that decision, as an authority, and under this principle no decision in entitled to any weight whatsoever upon any point not involved in the decision, even though such point might have been raised by the parties. That is the distinction between the weight of a decision as an authority and the weight of a decision as *res adjudicata*.

IX. There can be no estoppel unless the cause of action is the same. The cause of action is different in a suit for infringement from what it is in an interference proceeding. The aim, corresponding with the cause of action, of this defendant in the interference proceeding was to get a patent for itself. As soon as it was decided that Osterhout was the prior inventor this aim or cause of action was defeated, but it was not made certain thereby that Osterhout would get a patent, or what would be the claims of Osterhout's Patent, or what would be the construction of such claims when it came to the question of infringement. All these were questions beyond the aim or cause of action of the interference. They were questions concerning which Tebbetts and Doggett had no voice, and hence they could not be binding upon them or their assignee.

After the conclusion of the interference the Osterhout application became *ex parte*. Questions could then arise between the Patent Office and Osterhout as to the admission into the Osterhout application of claims covering the subject matter of the interference; the Office could, on proper grounds, refuse to allow Osterhout claims corresponding to the issues, because of no right in Osterhout ot make the claims, in view of the invention set forth in his application, or the Office could admit such claims and then reject them for inoperativeness of the combinations involved, or for lack of patentability—concerning all of which Tebbetts and Doggett could have no voice.

Rule 96 of the Rules of Practice of the Patent Office provides:

> "96. When, however, a party who is required to put his application in a condition proper for an interference fails to do so within a reasonable time specified, the declaration of interference will not be delayed. After final judgment of priority, the application of such party will be held for revision and restriction, subject to interferences with other applications.

Bearing in mind that Tebbetts & Doggett defaulted, and that during the pendency of the interference Osterhout had no claims in his application corresponding in terms or subject matter to the issues thereof, Rule 126 of the Patent Office Rules of Practice is pertinent as showing *(a)* that if an interference proceeds to hearing the interference tribunals on their own motion can examine into matters not relating to priority; and, *(b)* that should such matters escape their attention, the primary examiner, when the applications of the contestants are again returned to his department, can *ex parte* treat of any matter affecting the rights of either party.

In its brief, on page 17, complainant asks: "Can the judgment of the Patent Office legally be ignored?"

That it can, we rely upon the decisions of this Honorable Court in Hill vs. Wooster, 132 U. S., 693, 698; also, in Consolidated Electric Light Co. vs. McKeesport Co. (The Incandescent Lamp) 159 U. S., 465; 40 Fed. Rep., 28; and in Thompson vs. Hall, 130 U. S., 117; also, the decision of the Circuit Court of Appeals for the Sixth Circuit, in Christie vs. Seybold, 6 U. S. App., 520, 540; also, the decision of the Court of Appeals for the Third Circuit in the U. S. Electric Light Co. vs. Edison Lamp Co., 58 Fed. Rep., 692; 51 Fed. Rep., 24.

In the first-mentioned case, which was brought under the provisions of Section 4915 of the Revised Statutes, the Patent Office had declared an interference between the contestants upon a particular invention involving subject matter pertaining to improvements in milk coolers. The rules of the Patent Office at that time required, as in the language of Rule 93, "that an interference is a proceeding instituted for the purpose of determining the question of priority of invention between two or more parties claiming the same patentable invention." In other words, the Patent Office in the case of Hill vs. Wooster had declared, as its judgment, that the subject matter of interference was a patentable invention, and the litigation proceeded upon that basis until it reached this Honorable Court, when this Court had no hesitation in declaring, on its own motion, that the subject matter in interference did not constitute patentable invention. On page 698 the Court said:

> "The parties to the present suit appear to have been willing to ignore the question as to patentability in the present case, and to have litigated merely the question of priority of invention on the assumption that the invention was patentable. But neither the Circuit Court nor this Court can overlook the question of patentability. The bill claims a patent for what it alleges was invented by Wooster as a patentable invention; and the answer of the defendants is founded upon the view

that Hill and Prentice were the first inventors of the improuements covered by the four claims in question as patentable inventions."

"We are of opinion that nothing in those four claims constitutes a patentable invention."

In the Incandescent Lamp Patent case above referred to a reading of the decisions of the Circuit Court and of this Honorable Court shows that an interference had been declared upon the broad subject matter of a fibrous filament between the applications of Sawyer and Mann and of Edison while pending in the U. S. Patent Office, after which a patent to Sawyer and Mann, as the successful contestants on the question of priority of invention, was issued. Suit for infringement was brought by the owners of the Sawyer and Mann Patent against the defendants, the users of the Edison fibrous filament; and, under the proofs, the Circuit Court, notwithstanding the judgment of the Patent Office as to the patentability of the broad claim and the issueof the patent thereon, decided that such broad claim was invalid and void.

In the consideration of the case by this Honorable Court, the Court made substantially the same finding, and, in speaking of the question of priority of invention, treated the Patent Office decision as not *res adjudicata*, saying (p. 477):

"As these suggestions are of themselves sufficient to dispose of the case adversely to the complainant, a consideration of the question of priority of invention, or rather of the extent and results of the Sawyer and Mann experiments, which was so fully argued on both sides and passed upon by the Court below, becomes unnecessary."

In U. S. Electric L. Co. vs. Edison Co., 58 Fed. Rep., 692, 21 Fed. Rep., 24, the result of an interference between the same parties had been a judgment of priority in favor of Weston, but, instead of treating it as *res adjudicata*, both the Circuit Court and the Court of Appeals reversed it in an infringement suit under the Weston Patent.

The opinion reported in Thompson vs. Hall, 130 U. S., 170, does not mention the interference, but an examination of the record will show that in that case this Court reversed a judgment of priority between the same parties in an interference instead of treating it as *res adjudicata*. The judgment and testimony on the interference were printed as an exhibit in the record before this Court, and show that this Court decided the case on the precise point on which the Commissioner of Patents had decided it, but in favor of the opposite party.

In Christie vs. Seybold almost the exact question involved in this case arose and was decided, notwithstanding the judgment of the Patent Office.

In that case, as in the present, the Patent Office declared an interference between the contestants upon an issue framed by the Patent Office, and the question was raised in the Court below whether the Christie device included a "platen detachably connected with the power-driving mechanism." It was urged that that question could not be raised because it was not raised in the interference proceedings in the Patent Office, and, on appeal, touching that question, the Circuit Court of Appeals said as follows:

> (Page 540:) "It is contended by appellant that it was too late for the complainant to raise the question, in the Court below, whether Christie's device includes 'a platen detachably connected with the power-driving mechanism,' because it was not raised in the interference proceedings in the Patent Office. It is said he is thereby estopped to make it. We do not concur in this view. The interference issue is drawn up by the Patent Office examiners, and the interference is declared, before either party has access to the specification of the other, and the claims made with respect to the issue are submitted before the specifications are disclosed. Subsequently, perhaps, the question might be raised, but we do not think that a failure to raise it in the Patent Office prevents its being brought to the attention of the

> Court in a proceeding like this by independent bill.
>
> "The fact, if it be a fact, that the invention of one of the parties does not include the issue declared in the interference, proceedings is apparent on the record."

In *Hill vs. Wooster*, 132 U. S., 693, which was also a proceeding in equity under Section 4915 of the Revised Statutes, the Supreme Court

> "held that the Court, of its own motion, must declare that the issuable device in the interference proceedings was not patentable for want of invention, and could therefore dismiss the bill, although the question had not been raised either in the Patent Office or by the parties in the Court below, or in the Supreme Court. We do not see why the Court has not the same power with reference to the present question. The fact, if it be a fact, that Seybold did not raise it in the Patent Office may, of course, affect the weight of his present objection, but it has no force as an estoppel."

The contention here on the part of complainant is that, because Tebbetts & Doggett did not raise a similar question in the interference in the Patent Office, their assignee, the Wheeler and Wilson Manufacturing Company, were precluded from raising the question in the Circuit Court and in the Circuit Court of Appeals.

Taking the decision in this cause of the Circuit Court of Appeals, for instance, that Court was obliged, in the light of the specifications and drawings of the patent in suit, the state of the art, and the proofs presented to it, to properly construe claims 21 and 22 and ascertain their meets and bounds. This the Court did.

Complainant now seeks to urge upon this Court, irrespective of the decision of the Circuit Court of Appeals as to the scope of claims 21 and 22, based upon their understanding of the invention set forth in the patent, and of the light to be gathered from the state of the art and of the proofs presented to it, that the Cir-

cuit Court of Appeals should have given an altogether different scope to said claims—an artificial scope, contrary to its judgment—simply because Tebbets & Doggett defaulted in the interference in the Patent Office.

In other words, the complainant would say, and, in fact, does say, that the Circuit Court of Appeals must not construe a claim of a patent according to its own judgment in the light of the patent itself, the art and proofs presented to it, but must accept as controlling its judgment an issue framed by one of the examiners in the Patent Office.

Manifestly, the statement of such a proposition shows that the doctrine of *res adjudicata* should not be extended, by virtue of interference proceedings in the Patent Office, beyond the sole question involved in such cases, namely, that of priority of invention; and that the Circuit Court of Appeals is not precluded from entertaining the questions of patentability and scope of Claims 21 and 22, and of their infringement by this defendant.

It is respectfully submitted that the writ of *certiorari* should be denied.

April, 1897.

JAMES H. LANGE,
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For Defendant.